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No. 03-725
Title: David B. Pasquantino, Carl J. Pasquantino, and Arthur Hilts, Petitioners
v.
United States
Docketed: November 18, 2003
Lower Ct: United States Court of Appeals for the Fourth Circuit
Case Nos.: (01-4463, 01-4464, 01-4465)
Decision Date: July 18, 2003
Questions Presented

~~Date~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~
Sep 25 2003	Application (03A268) to extend the time to file a petition for a writ of certiorari from October 16, 2003 to November 15, 2003, submitted to The Chief Justice.
Sep 29 2003	Application (03A268) granted by The Chief Justice extending the time to file until November 15, 2003.
Nov 14 2003	Petition for a writ of certiorari filed. (Response due December 18, 2003)
Dec 9 2003	Order extending time to file response to petition to and including January 14, 2004.
Jan 15 2004	Order further extending time to file response to petition to and including February 27, 2004.
Feb 27 2004	Brief of respondent United States in opposition filed.
Feb 27 2004	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Mar 10 2004	DISTRIBUTED for Conference of March 26, 2004.
Mar 16 2004	Reply of petitioners David B. Pasquantino, et al. filed. (Distributed)
Mar 29 2004	DISTRIBUTED for Conference of April 2, 2004.
Apr 5 2004	Petition GRANTED.
Apr 21 2004	Extension of time within which to file the joint appendix and petitioners' brief on the merits to and including June 29, 2004.
Jun 29 2004	Brief amici curiae of National Association of Criminal Defense Lawyers, et al. filed.
Jun 29 2004	Joint appendix filed.
Jun 29 2004	Brief of petitioners David B. Pasquantino, et al. filed.
Aug 3 2004	Brief of respondent United States filed.
Aug 10 2004	Application (04A122) to extend the time to file a reply brief from September 7, 2004 to September 28, 2004, submitted to The Chief Justice.
Aug 13 2004	Application (04A122) granted by The Chief Justice extending the time to file until October 7, 2004.
Aug 18 2004	Motion for divided argument filed by petitioners David B. Pasquantino, et al.
Aug 19 2004	CIRCULATED.
Sep 1 2004	SET FOR ARGUMENT Tuesday, November 9, 2004.
Sep 24 2004	Record received from U.S.C.A. - 4th Circuit. (1 envelope, a portion of record is sealed)
Sep 28 2004	Motion for divided argument filed by petitioner DENIED.
Sep 29 2004	Record received from U.S.D.C. for Dist. of Maryland. (1 box containing 2 sealed envelopes)
Oct 7 2004	Reply of petitioners David B. Pasquantino, et al. filed. (Distributed)
Nov 8 2004	Letter and attachment of Tax Division Directive #99, dated November 8, 2004, received

	from the Acting Solicitor General. (Distributed).
Nov 9 2004	Argued. For petitioners: Laura W. Brill, Los Angeles, Calif. For respondent: Michael R. Dreeben, Deputy Solicitor General, Department of Justice, Washington, D.C.

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IN THE

Supreme Court of the United States

DAVID B. PASQUANTINO,
CARL J. PASQUANTINO &
ARTHUR HILTS,
Petitioners,

v.

UNITED STATES OF AMERICA
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JENSEN E. BARBER
JENSEN E. BARBER & ASSOCS.
400 – 7th Street, N.W.
Washington, DC 20004
(202) 737-8511

Counsel for Petitioner
David B. Pasquantino

LAURA W. BRILL *
CHRISTOPHER NEWMAN
IRELL & MANELLA, LLP
1800 Avenue of the Stars
Los Angeles, California 90067
(310) 277-1010

Counsel for Petitioner
Arthur Hilts

BRUCE R. BRYAN
333 East Onondaga Street
Syracuse, New York 13202
(315) 476-1800

Counsel for Petitioner
Carl J. Pasquantino

* Counsel of Record

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QUESTION PRESENTED

Whether the federal wire fraud statute (18 U.S.C. § 1343) authorizes criminal prosecution of an alleged fraudulent scheme to avoid payment of taxes potentially owed to a foreign sovereign, given the lack of any clear statement by Congress to override the common law revenue rule, the interests of both the Legislative and Executive Branches in guiding foreign affairs, and this Court's prior rulings concerning the limited scope of the term "property" as used in the wire fraud statute.

PARTIES TO THE PROCEEDING

The Petitioners in this Court are Arthur Hilts, Carl J. Pasquantino, and David B. Pasquantino. The Respondent is the United States of America.

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No. 03-___

DAVID B. PASQUANTINO,
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Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR CERTIORARI

Petitioners, David B. Pasquantino, Carl J. Pasquantino, and Arthur Hilts, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the en banc court of appeals affirming the convictions (App., *infra*, 1a-37a) is reported at 336 F.3d 321 (4th Cir. 2003). The original panel opinion reversing the convictions (App., *infra*, 38a-53a) is reported at 305 F.3d 291 (4th Cir. 2002). The oral opinion of the district court denying Petitioners' motion to dismiss the indictment is unreported.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2003. On September 29, 2003, this Court granted an extension of time in which to file the present petition until November 15, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 18, United States Code, Section 1343 states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

On April 13, 2000, a federal grand jury in the Northern District of Maryland returned a multi-count indictment charging David B. Pasquantino, Carl J. Pasquantino and Arthur Hilts (collectively, "Petitioners"), along with four other individuals, on six counts of wire fraud and aiding and abetting wire fraud, in violation of 18 U.S.C. §§ 2 and 1343. The indictment alleged that Petitioners had engaged in a scheme to defraud Canada and the Province of Ontario of liquor duties and excise taxes. According to the indictment, Petitioners and their codefendants had used interstate telephone calls to order liquor from suppliers in Maryland, which they then transported into Canada without payment of appropriate Canadian taxes. App. 57a-64a.

Petitioners moved to dismiss the indictment on the ground that the United States did not have a justiciable property or

monetary interest in their putative smuggling scheme against Canada, a foreign sovereign. On September 7, 2000, the district court denied Petitioners' motion, and the case was tried to verdict.

The evidence submitted at trial demonstrated that all domestic taxes had been paid. App. 40a. The only testimony regarding the alleged failure to pay taxes to the government of Canada or the Province of Ontario came in the form of testimony from a Canadian Customs Officer, who provided no evidence that Canada or Ontario taxed liquor imports at the time of the alleged offense or that taxes were due and owing upon entry into Canada, or that any Canadian court or agency had issued any judgment or finding of fact as to the amount of taxes that Petitioners allegedly owed. *See* App. 36a-37a; 54a-56a.

Petitioners were convicted on February 13, 2001. Petitioners were sentenced on June 8, 2001, with Messrs. Carl and David Pasquantino each receiving fifty-seven months' imprisonment on each count, to be served concurrently, and Mr. Hilts receiving twenty-one months. Petitioners timely filed a notice of appeal on June 8, 2001.

On September 30, 2002, a panel of the United States Court of Appeals for the Fourth Circuit reversed the convictions. The panel asserted that although Canada's right to collect accrued taxes was a property right, the "determination of whether Canada was actually or would have been *entitled to the tax revenues* involves an inquiry into the validity and operation of a foreign revenue law." App. 44a (emphasis in original). The panel concluded that "principles underlying the revenue rule"—which the panel described as a "long-standing common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns"—bar the inquiry into Canada's entitlement to tax revenue and "therefore bar appel-

lants' prosecution in this case." App. 44a-46a. The Fourth Circuit took note of a split in authority on what it described as a "difficult question indeed," and held that the decision of the First Circuit in *United States v. Boots*, 80 F.3d 580 (1st Cir. 1996), a case in which the court found that the revenue rule barred a wire fraud prosecution based on failure to pay foreign taxes, was better reasoned than the "flawed" decision of the Second Circuit in *United States v. Trapilo*, 130 F.3d 457 (2d Cir. 1997), which reached the opposite conclusion. App. 46a-50a. The panel also rejected the notion that the revenue rule provided any basis for treating civil and criminal cases differently. App. 49a at n.23.[1]

The Fourth Circuit granted a request by the government for rehearing en banc, and on July 18, 2003, affirmed the decision of the district court and reinstated petitioners' convictions, finding that the revenue rule is permissive, not mandatory, and applies only to foreign tax judgments, not unadjudicated tax claims. App. 11a & n.3. In addition, the en banc majority acknowledged that there was no evidence that the foreign taxes at issue in this case had been in place at the time of Petitioners' alleged conduct, but held nonetheless that the jury was entitled to draw such an inference from the fact that the Canadian Customs official who testified as to the existence of Canadian tax laws at the time of trial had been assigned to investigate Petitioners based on the conduct of which they were convicted. App. 18a-20a.[2] Judge Gregory and Judge Michael dissented, arguing that the revenue rule barred Petitioners' conviction. App. 27a-37a.

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[1] Judge Hamilton dissented, arguing that the revenue rule did not bar the prosecution. App. 50a-53a.

[2] The en banc panel also affirmed the District Court's sentencing determination, which calculated intended loss under U.S.S.G. § 2F1.1(b)(1)(L) based upon estimated tax revenue loss to the Canadian government. App. 24a-26a.

REASONS FOR GRANTING THE PETITION

I. THERE IS A CLEAR AND WELL-DEVELOPED CONFLICT OF AUTHORITY AMONG THE UNITED STATES COURTS OF APPEALS REGARDING THE PROPER SCOPE OF SECTION 1343 IN LIGHT OF THE REVENUE RULE.

A. The Underpinnings of the Conflict

1. *The Revenue Rule*

Recognized for hundreds of years by the United States and foreign governments, the revenue rule is a principle of common law holding that the courts of one sovereign do not give effect to the revenue laws of another sovereign.[3] Over the centuries, the rule has received numerous formulations of varying breadth and force, ranging from categorical refusal to take any notice of a foreign nation's revenue laws,[4] to the nar-

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[3] *See, e.g., Sun Oil Co. v. Wortman*, 486 U.S. 717, 740 n. 3 (1988) (Brennan, J., concurring) (noting the rule's continued existence in the nation-to-nation setting); *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 413-14 (1964) ("[A] court need not give effect to the penal or revenue laws of foreign countries."); *Oklahoma v. Gulf, Colo. & Santa Fe Ry. Co.*, 220 U.S. 290, 299 (1911) ("The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state for the recovery of pecuniary penalties for any violation of statutes for the protection of its revenue or other municipal laws, and to all judgments for such penalties.") (quoting *Wisconsin v. Pelican Ins. Co. of New Orleans*, 127 U.S. 265, 290 (1888), overruled in part by *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 278 (1935)).

[4] *See, e.g., Government of India v. Taylor*, [1955] A.C. 491, 508 (H.L.) ("We proceed upon the assumption that there is a rule of the common law that our courts will not regard the revenue laws of other countries: it is sometimes, not happily perhaps, called a rule of private international law: it is at least a rule which is enforced with the knowledge that in foreign countries the same rule is observed."); *State of Colorado v. Harbeck*, 232 N.Y. 71, 85, 133 N.E. 357 (1921) ("The rule is universally recognized that

rower statement that "one sovereignty may not maintain an action in the courts of another state for the collection of a tax claim." *United States v. First Nat'l City Bank*, 321 F.2d 14, 23-24 (2d Cir. 1963). Even in courts where a narrower formulation has been used, there has generally been an understanding that the rule is not limited to attempts at direct enforcement of foreign revenue judgments or claims, but applies as well to actions brought under domestic law that would have the same effect. *See, e.g., Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 131 (2d Cir. 2001) (holding that a civil RICO suit predicated on claims of wire fraud aimed at defrauding Canada of revenue was "in essence an indirect attempt to have a United States court enforce Canadian revenue laws, an exercise barred by the revenue rule."), *cert denied*, 537 U.S. 1000 (2002).[5]

In this Court, the United States has taken the position that "[t]he revenue rule is a long established and widely accepted principle of the common law under which courts of one sov-

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the revenue laws of one state have no force in another."); *Planche v. Fletcher*, 99 Eng. Rep. 164, 165 (K.B. 1779) (Lord Mansfield) ("One nation does not take notice of the revenue laws of another."); *Holman v. Johnson*, 98 Eng. Rep. 1120, 1121 (K.B. 1775) (Lord Mansfield) ("For no country ever takes notice of the revenue laws of another.").

[5] *See also United States v. Harden*, [1963] S.C.R. 366, 371 (Can.) (rejecting the enforcement of a stipulation of settlement of a tax case based on the "special principle that foreign States cannot directly or indirectly enforce their tax claims [in our courts]") (quoting Taylor, A.C. at 515); *Stringam v. Dubois*, [1993] 3 W.W.R. 273, 282-83 (Alta.Ct.App.) (barring claim of estate executor to compel sale of Canadian property because sale proceeds would be used to satisfy American estate taxes); Felix D. Strebel, *The Enforcement of Foreign Judgments & Foreign Public Law*, 21 Loy. L.A. Int'l & Comp. L.J. 55, 75 (1999) (reviewing Canadian cases which hold that "it is a well-established rule of public policy that Canadian law forbids a foreign state from suing, either directly or indirectly, in Canada for taxes alleged to be due to the state").

ereign will not enforce the tax judgments and unadjudicated tax claims of another sovereign." Brief for the United States as Amicus Curiae at 7, *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.* (S.Ct. Case No. 01-1317) (Oct. 2002) (opposing certiorari). "[N]umerous domestic and foreign courts have applied the rule to bar claims that, *in substance*, seek to enforce foreign revenue laws." *Id.* at 8 (emphasis added); *see also* Brief of the National Association of Manufacturers and United States Chamber of Commerce as Amici Curiae at 7, *R.J. Reynolds*, 268 F.3d 103 (2d Cir. 2001) (No. 00-7972) ("NAM Amicus Brief") (Theodore B. Olson, Counsel of Record) ("It is beyond dispute that the Revenue Rule has been consistently applied in the international community. In fact, no court has failed to apply the rule when asked to give effect to the revenue laws of a foreign sovereign.").

As with most longstanding common law doctrines, courts invoking the revenue rule have articulated various rationales for its existence. All of them, however, rest ultimately on the principle that while courts are generally willing to vindicate the private rights of individuals within their jurisdiction, and will sometimes apply foreign law in doing so, penal laws—of which revenue laws are a subset—are understood to be different in nature. Such laws embody the political will of a particular sovereign and enforce obligations imposed on individuals by fiat, often for purely political ends. This is particularly true of revenue laws, whose most basic object is appropriation of the resources a state regards as necessary to maintain its existence and pursue its interests.[6] At the same

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[6] *See Taylor*, [1955] A.C. at 511 ("[A] claim for taxes is but an extension of the sovereign power which imposed the taxes, and ... an assertion of sovereign authority by one State within the territory of another ... is (treaty or convention apart) contrary to all concepts of independent sovereignties.").

time, revenue laws are frequently used to further various other state policies particular to the sovereign enacting them, such as maintenance of an ideologically desirable distribution of wealth, enforcement of political and moral judgments about certain persons, activities or products,[7] and advancement of the state's perceived industrial and commercial interests.[8] The revenue rule reflects a widespread recognition that the extent to which one nation will assist another nation in pursuing these types of policies is a matter properly decided by those to whom the treaty power is entrusted, not by normal operation of the court system. For courts to accept adjudication of such matters would routinely put them in the position of passing on the validity and construction of another nation's revenue laws and determining whether the policy judgments they embody were sufficiently compatible with those of our own political system to be enforced.[9]

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[7] *See, e.g., R.J. Reynolds*, 268 F.3d at 113 ("How would we respond if . . . a foreign nation imposed an immigration tax on members of a particular religious group or racial minority?"); *Pasquantino*, 305 F.3d 291, 297 n.9 ("[I]magine that Canada imposed an import duty on bibles, and appellants schemed to smuggle bibles rather than liquor. The revenue rule was created in part to avoid these types of political and foreign policy-based determinations.") (subsequently vacated panel opinion); App. 48a.

[8] *See, e.g., R.J. Reynolds*, 268 F.3d at 113 ("How would we respond if a foreign sovereign asked us to help enforce a tax designed to render it very expensive to sell United States newspapers in that nation? Or to make the inclusion of United States-made content in machinery built in that foreign country prohibitively expensive?").

[9] *See, e.g., Peter Buchanan L.D. v. McVey*, [1955] A.C. 516, 529 (Ir.H.Ct.1950), cited in *Sabbatino*, 376 U.S. at 437-38:

> [M]odern history [is not] without examples of revenue laws used for purposes which would not only affront the strongest feelings of neighboring communities but would run counter to their political aims and vital interests . . . . So long as these possibilities exist it would be equally unwise for the courts to permit the enforcement of the revenue claims of foreign States or to attempt to discriminate between those claims which they would and those which they would not enforce. Safety lies only in universal rejection.

See also Moore v. Mitchell, 30 F.2d 600, 604 (2d Cir. 1929):

> [A] court will not recognize those [liabilities] arising in a foreign state, if they run counter to the 'settled public policy' of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic state . . . . No court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper.

(L. Hand, J., concurring), *aff'd on other grounds*, 281 U.S. 18 (1930).

This case raises an important issue regarding the application of the revenue rule: whether despite the existence of the rule, the Executive Branch can nonetheless prosecute for wire fraud where the only alleged intended loss is a loss of tax revenue to a foreign sovereign. As explained in more detail below, this is an issue as to which the courts of appeals are divided and which raises important separation-of-powers and other issues, as Congress has not authorized the prosecutions in question but rather has insisted upon reciprocity with foreign nations on matters of tax enforcement, a condition that is not satisfied in this case.

2. *The Requirement that a "Scheme to Defraud" Under Section 1343 Be Aimed at "Money or Property"*

Petitioners were convicted under the federal wire fraud statute, 18 U.S.C. Section 1343. This statute provides for criminal punishment of anyone who, "having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises," uses some means of interstate transmission in furtherance of that scheme. 18 U.S.C. § 1343 (2002). The "money or property" limitation

is inherent in the meaning of "scheme or artifice to defraud," so conduct is not actionable under the statute unless its aim is to deprive someone of actual money or property. *See McNally v. United States*, 483 U.S. 350, 360 (1987).[10]

This Court has also refused efforts by the Government to expand the reach of the mail and wire fraud statutes by applying them to state interests not falling within the traditional concept of "property." *See Cleveland v. United States*, 531 U.S. 12 (2000). In this Court's analysis, the determination of whether a government has been defrauded of property involves an inquiry into whether the government's interest is primarily regulatory or fiscal in nature, the extent to which the relevant interest is transferable, and the extent to which the government has put its own assets at risk, among other factors. *Id.* at 22-24. *Cleveland* held that a fraudulent scheme aimed at obtaining an unissued gaming license was not actionable under the mail fraud statute, because such a license did not constitute "property" in the hands of the state. *See id.* at 24. To allow such a prosecution, this Court stated, would be to "approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress."[11] *Id.* This case involves a similar sweeping expan-

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[10] The statute has since been amended by Congress to also include schemes to deprive someone of the "right to honest services." *See Cleveland v. United States*, 531 U.S. 12, 19-20 (2000). This aspect of the statute is not at issue in this case. The wire fraud statute, 18 U.S.C. § 1343, is the "lineal descendant" of the mail fraud statute, 18 U.S.C. § 1341. *McNally*, 483 U.S. at 374 (citation and internal quotation marks omitted). "Because these statutes use the same relevant language, they are analyzed in the same way." *See, e.g., United States v. Slevin*, 106 F.3d 1086, 1088 (2d Cir. 1996).

[11] This Court also stated in *Cleveland* that the rule of lenity is "especially appropriate" in interpreting the scope of "property" under Section 1341, for the reason that this statute—like Section 1343—defines a predicate RICO offense. *See* 531 U.S. at 25.

sion, one that seeks to treat potential revenue claims of a foreign sovereign—whether or not reduced to final judgments or actual assessments and whether or not Congress has approved cooperation in this sphere—as "property."

B. The Circuit Split over Application of Section 1343 To Schemes Whose Sole Object Is the Avoidance of Taxes Potentially Owed to a Foreign Sovereign.

Four Circuits have addressed the question whether efforts to avoid paying taxes to a foreign sovereign constitute actionable mail fraud or wire fraud. The cases have resulted in doctrinal disarray.

1. *The First Circuit*

In *United States v. Boots*, 80 F.3d 580 (1st Cir. 1996), the defendants had been convicted of wire fraud on the basis of a scheme to deprive Canada of revenue by transporting tobacco into the country without paying excise duties at the border. The court reasoned that because the alleged scheme to defraud had as its sole object the violation of Canadian revenue laws, the convictions could be upheld only on the basis of a determination that the petitioners had intended to violate those laws. *See* 80 F.3d at 587. This in turn would require the court to pass on any challenges to those laws and any claims that the petitioners' actual or intended actions would not actually have violated them. *See id.* Because the court would thus be "effectively passing on the validity and operation of the revenue laws of a foreign country," the First Circuit found that "the important concerns underlying the revenue rule [we]re implicated." *Id.*

In the First Circuit's view, even though the case did not require it "to enforce a foreign tax judgment as such," upholding the conviction would "amount functionally to penal enforcement of Canadian customs and tax laws." *Id.* In addi-

tion to violating the long-standing revenue rule, the court found that this would conflict with the policy of Congress, embodied in 18 U.S.C. § 546, that the United States should criminally penalize the smuggling of goods only into those foreign countries that have a reciprocal law. *See* 80 F.3d at 588. Given these inherent tensions, the First Circuit found that if Congress wished to authorize courts to apply the wire fraud statute to evasion of foreign tax obligations, "'it must speak more clearly than it has.'" *Id.* (quoting *McNally v. United States*, 483 U.S. 350, 360 (1987)). Accordingly, the court ruled that schemes to avoid payment of taxes to a foreign sovereign are not schemes to defraud within the meaning of Section 1343. *Id.*

2. *The Second Circuit*

The Second Circuit has addressed the application of the revenue rule to mail fraud or wire fraud involving nonpayment of foreign taxes on three different occasions. In *United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997), the court reviewed a district court's dismissal, in accordance with *Boots*, of an indictment alleging wire fraud on the basis of a "scheme to defraud" whose sole object was the importation of liquor into Canada in avoidance of Canadian revenue law. *See* 130 F.3d at 548-49. The court reversed, holding that the defendants' actions fell within the language of the statute and that the First Circuit in *Boots* had been mistaken in believing the revenue rule to be implicated by such a prosecution. In reaching this result, the Second Circuit reasoned that there was no need to pass on the validity of the underlying Canadian revenue law, because the only question was whether the defendants had used interstate wires in furtherance of a scheme *intended* to defraud someone of money or property. *See* 130 F.3d at 552. In the *Trapilo* court's view, the substance of the Canadian law would be relevant only to the question whether the defendants had *succeeded* in defrauding the Canadian government of money or property. *See id.* Because the ultimate success of a scheme to defraud is not an element of the offense, the court held that the revenue rule was not implicated by the prosecution. *See id.* at 552-53.[12]

The Second Circuit undermined the reasoning of *Trapilo* three years later, when it decided *United States v. Pierce*, 224 F.3d 158 (2d. Cir. 2000). In *Pierce*, the court reversed the convictions of several of the same defendants whose prosecution it had allowed to proceed in *Trapilo*. *See* 224 F.3d at 160. The court observed that the defendants were "not accused of scheming to defraud the Canadian government of its property, but of its *right* to obtain property, its *right* to be paid money."[13] *See id.* at 165 (emphases in original). Accordingly, the Second Circuit held that the prosecution had to prove that such a right actually existed. *Id.* Whereas the court in *Trapilo* had reasoned that legal impossibility was irrelevant to a defendant's having formed the requisite intent to defraud, *see* 130 F.3d at 552 n.9, in *Pierce* the court recognized that the statutory requirement of a fraudulent scheme directed at "money or property" could not be satisfied if there were no Canadian statute creating the "property" by actually imposing the import duty in the first place. *See* 224 F.3d at 166. The prosecution's failure to introduce evidence at trial

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[12] Two of the defendants in *Trapilo* sought review in this Court. In opposing the petition for certiorari, the government recognized the existence of a direct conflict between the Second Circuit's decision in *Trapilo* and the First Circuit's decision in *Boots*. The government, however, urged this Court to defer review because only two circuits had then passed on the issue. *See* Brief For The United States In Opposition at 5, *Pierce v. United States* (S.Ct. Case Nos. 97-1792; 97-8964) (July 1998).

[13] The Second Circuit announced its decision in *Pierce* in August 2000, three months before this Court decided *Cleveland*. The Second Circuit did not address whether the convictions should be set aside for the independent reason that the right to receive taxes was not an adequate property interest under the wire fraud statute.

demonstrating the existence of such a revenue law thus required that the convictions be reversed.[14] *See id.*

One year later, in *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001), the Second Circuit was called upon to decide whether, given that it had held that evasion of foreign taxes may constitute a "scheme to defraud" under Section 1343, the foreign sovereign victimized by such a scheme could seek damages in a civil action under the Racketeer Influenced and Corrupt Organizations Act ("RICO"). In a thorough opinion, the Second Circuit recognized the "continuing vitality" of the revenue rule. *See* 268 F.3d at 109-26. The court also acknowledged that this Court's holding in *Cleveland* had cast doubt upon the correctness of *Trapilo* and *Pierce*. *See id.* at 124 n.27.[15]

The defendant tobacco companies in *R.J. Reynolds* were alleged to have engaged in a pattern of smuggling tobacco products into Canada without paying the applicable import taxes. *See id.* at 105. Under the Second Circuit's holdings in *Trapilo* and *Pierce*, such conduct could clearly be prosecuted

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[14] The court attempted to reconcile its holding with *Trapilo* by making a distinction between the requirement that the government demonstrate the "existence" of a revenue law creating the alleged property right, and the need for a court to examine the validity and operation of such a law. *See Pierce*, 224 F.3d at 167. The court did not explain how a law that is in "existence," but invalid or inapplicable to the defendants' intended operations, could give rise to a property interest any more than a non-existent one.

[15] The Second Circuit will be required to confront the effect of *Cleveland* on the rule of *Trapilo* and *Pierce* in the currently pending case *Fountain v. United States*, 2d Cir. Case No. 03-2188. This is an appeal brought by a habeas petitioner on the ground that his conviction under the rule announced in *Trapilo* violates this Court's ruling in *Cleveland*. The present case provides a better vehicle for review, as it presents the issue in the context of a direct appeal, without the procedural hurdles potentially raised by a habeas petition.

as wire fraud without violating the revenue rule. Moreover, as this Court had pointed out in *Cleveland*, wire fraud has been expressly designated by Congress as a "racketeering activity" that may serve as the basis of a civil RICO action. Nevertheless, the Second Circuit concluded that to allow a foreign sovereign to bring such an action *would* violate the revenue rule and that the civil RICO statute should not be construed to bring about this result. The court attempted to reconcile this holding with *Trapilo* and *Pierce* by asserting that—even though violation of the identical statute was at issue in both cases—a civil RICO suit predicated on wire fraud would require the court to pass on whether the underlying fraud had been successful, whereas a criminal prosecution for wire fraud would not. *See* 268 F.3d at 108-09. The court also stated that, unlike a criminal prosecution, a civil action would require it to quantify the exact amount of unpaid revenue in order to determine damages. *See id.* Such determinations, the court reasoned, would directly implicate the core concerns of the revenue rule, and absent clear evidence of congressional intent to abrogate this rule, principles of statutory construction required it to construe the statute in a manner that preserved the revenue rule. *See id.* at 127.

In dissent, Judge Calabresi asserted that there is no basis in either the revenue rule or federal law for interpreting the scope of the wire fraud statute differently in criminal and civil cases, so that there was no way to distinguish *Trapilo* and *Pierce* from *R.J. Reynolds*, as the majority had sought to do. *See id.* at 138-40 (Calabresi, J., dissenting). Judge Calabresi further refuted the panel's distinction by pointing out that in the event of a conviction under *Trapilo* and *Pierce*, the sentencing guidelines would require a sentence to be imposed based on the amount of tax revenue lost, thus making necessary precisely the same degree of involvement with and inter-

pretation of Canadian law that the court claimed to fear in connection with the RICO suit. *See id.*[16]

Following the decision in *R.J. Reynolds*, the Attorney General of Canada filed a petition for certiorari, and this Court called for the views of the Solicitor General. The Solicitor General argued that when Congress authorized suits to recover for racketeering injuries, it did not intend to "permit the enforcement of *any* tax claim by *any* foreign government," regardless of whether the foreign country would permit a similar claim in its courts and regardless of the careful limits on such enforcement that have been embodied in bilateral treaties. Brief for United States as Amicus Curiae at 14, *Attorney General of Canada v. R.J. Reynolds*, S. Ct. Cas. No. 01-1317 (Oct. 2002). The Petitioners herein contend that precisely the same argument applies to Congress's authorization in general terms of prosecutions to punish schemes to defraud someone of property.

3. *The Fourth Circuit*

As already noted, the original Fourth Circuit panel in the present case agreed with the reasoning of the First Circuit in *Boots*, and reversed Petitioners' convictions on the ground that any determination as to whether Canada was actually, or would at some point have been, entitled to the tax revenues in question would involve an inquiry into the validity and operation of a foreign revenue law, and such a determination is barred by the revenue rule. *See* App. 44a. The panel majority rejected the Second Circuit's approach in *Trapilo* and *Pierce*, which recognized the need for the government to prove the *existence* of a foreign law giving rise to the alleged property right, while denying any need to pass on its validity

[16] Indeed, this is precisely what happened to Petitioners in the present case. *See* App. 24a-26a; 35a-36a.

and scope: "[R]ecognizing the *existence* of a law is inherently and inescapably tied to recognizing the *validity* and *scope* of that law." *See* App. 49a-50a. The Fourth Circuit en banc panel that affirmed Petitioners' convictions did not dispute this basic point, but rather avoided it completely. The en banc court accomplished this by giving the revenue rule a very narrow reading that called only for the "nonenforcement of foreign tax judgments," as opposed to the "nonrecognition of foreign revenue laws."[17] App. 11a. Under this narrow reading, the government's use of intended loss figures as a basis for sentencing also did not implicate the prohibitions of the revenue rule. *See* App. 24a-26a.

4. *The Eleventh Circuit*

Finally, the Eleventh Circuit has also addressed the application of the revenue rule to claims based on wire fraud. In *Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253 (11th Cir. 2003), the court affirmed the dismissal of a civil RICO suit brought by a foreign sovereign to recover taxes that were allegedly evaded by means of smuggling tobacco into its territory. *See id.* at 1255. The court did so on the basis of a construction of the revenue rule that required the court to abstain from considering any claims that would require the court to "pass judgment on unadjudicated foreign tax claims for which the political branches of our government have not provided an enforcement mechanism." 341 F.3d at 1261. In this connection, the Eleventh Circuit cited approvingly the First Circuit's statement in *Boots* that, "[w]here a domestic court is effectively passing on the validity and operation of the revenue laws of a foreign country, the important concerns underlying the revenue rule are implicated." 341 F.3d at 1256 (citing *Boots*, 80 F.3d at 587). While a

[17] As noted above, the United States has not taken such a narrow view of the revenue rule. *See supra* at 6-7.

criminal prosecution under the wire fraud statute was not before the Eleventh Circuit, its reasoning and its approval of *Boots* suggest that it would regard such an action as barred by the revenue rule.

As shown by these significant inter-circuit—and, in the case of the Second and Fourth Circuits, intra-circuit—disagreements, the question whether the federal wire fraud statute applies to schemes for avoiding payment of taxes to foreign sovereigns is a difficult and contentious one that has grown in significance over time and that only this Court can resolve. The various majority and dissenting opinions issued by these four circuits, while failing to achieve a coherent doctrine with regard to the interplay of the revenue rule and Section 1343, have raised and discussed virtually every facet of the problem.

II. THE FOURTH CIRCUIT'S RULING IN THIS CASE CREATES SERIOUS PROBLEMS WITH FAR-REACHING CONSEQUENCES

A. The Holdings of both the Second and Fourth Circuits Allow the Executive to Make and Implement Policy Regarding Enforcement of Foreign Revenue Laws Without Clear Authorization from—and in Direct Conflict with the Policies of—the Legislature

The Second and Fourth Circuits have ruled that prosecutions such as the one at issue in this case do not raise any problem of separation of powers in foreign affairs, because such prosecutions are brought by the Executive Branch, which has the constitutional authority to conduct foreign policy, and which will not bring such a case if it conflicts with U.S. interests in that sphere. *See Pasquantino*, 336 F.3d at 331 (App. 14a); *R.J. Reynolds*, 268 F.3d at 123. This conclusion overlooks the fact that the Legislative Branch is also responsible for foreign affairs, and has an interest in determining when and under what circumstances the United States will be involved in enforcing tax obligations of other countries. *See* U.S. Constitution, Art. 1, sec. 8 (giving Congress the power to regulate commerce with foreign nations); *id.* at Art. 2, sec. 2 (requiring that treaties be made with consent of Senate). The question presented is whether the wire fraud statute—which lacks any express reference or facially evident relation to foreign policy—can properly be read as conferring carte blanche in these matters to the Executive. There are a number of reasons for believing that the Executive's exercise of unilateral discretion in this area conflicts with relevant policies enacted by the Legislature.

The United States has over the years entered into several tax treaties with foreign sovereigns that provide for information exchange and sometimes for limited collection assistance. *See R.J. Reynolds*, 268 F.3d at 115-19 (reviewing history of such agreements). As the Second Circuit has recognized, review of these treaties shows that "the political branches of our government have clearly expressed their intention to define and strictly limit the parameters of any assistance given with regard to the extraterritorial enforcement of a foreign sovereign's tax laws." *Id.* at 119.

In 1995, for example, the Senate ratified a treaty with Canada that provided for such assistance. *See* Revised Protocol Amending the Convention With Respect to Taxes on Income and on Capital of September 26, 1980, Mar. 17, 1995, U.S.-Canada, art. 15, S. Treaty Doc. No. 104-4 ("Revised Protocol"). Notably, this treaty provides that the United States shall give such assistance only if Canada certifies that a revenue claim has been "finally determined." *Id.* at Art. 15, ¶ 2. The Revised Protocol does not authorize the United States to assist Canada in the collection of unadjudicated tax claims, an effort that would not only embroil the United States in assisting with collection efforts, but require U.S. courts to develop expertise regarding the operation and effect of revenue laws

that are comparable in complexity to our own. In addition, the Revised Protocol states that "[n]o assistance shall be provided" with regard to Canadian revenue claims against persons who are U.S. citizens or corporations at the time that the tax liability is incurred. *Id.*, ¶ 8.

Even the sharply circumscribed level of assistance provided for in the Revised Protocol was regarded as a major step, one that was taken only after lengthy and careful consideration, and that was possible only because of the extremely close ties between the United States and Canada and the similarity of the legal and procedural protections afforded by the two states. *See R.J. Reynolds*, 268 F.3d at 121 (quoting *Treasury Technical Explanation* (discussing art. 15)). The prosecution in this case is in serious tension with this treaty both because Petitioners were U.S. citizens at all relevant times and because their tax liability, if any, to the government of Canada was never subject to a final determination or other assessment in that country.[18]

Moreover, the Extradition Treaty between the United States and Canada requires each country to deliver to the other any person who has been accused of the "[u]se of the mails or other means of communication in connection with schemes devised or intended to deceive or defraud the public or for the purpose of obtaining money or property by false pretenses." Treaty on Extradition Between the United States

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[18] As a leading tax commentator has written, tax laws "are not self-enforcing and do not themselves create a collectible liability." Michael I. Saltzman, IRS Practice and Procedure ¶ 10.01 (2003) (discussing the "fundamental importance of an assessment in the administration of the tax laws"); *see also Bull v. United States*, 295 U.S. 247, 259 (1935) (noting that under U.S. tax law, "[t]he statute prescribes the rule of taxation. Some machinery must be provided for applying the rule to the facts in each taxpayer's case, in order to ascertain the amount due. The chosen instrumentality for the purpose is an administrative agency whose action is called an assessment.").

and Canada, art. 1; annexed schedule, no. 27, TIAS 8237; 27 U.S.T. 983; 1971 U.S.T. Lexis 226 (March 22, 1976, Date-In-Force). Such provision manifests a strong intent by the political branches to handle criminal prosecutions of this nature through the treaty process, and not through unilateral action by a federal prosecutor.

In view of the careful consideration that went into negotiating and delimiting these international agreements, it seems highly incongruous to conclude, as does the Fourth Circuit, that the wire fraud statute—adopted without any apparent consideration of these issues at all—authorizes federal prosecutors to bring criminal actions against U.S. citizens for evasion of *any* revenue law promulgated by *any* foreign country, regardless of whether there is or ever could be a "finally determined" tax judgment on which to base such prosecution.

The Fourth Circuit's interpretation of the wire fraud statute in this case is also in apparent conflict with federal law regarding prosecution of the smuggling of goods into foreign countries. Congress has enacted a statute addressed specifically to this issue, and it provides that the federal government may prosecute smuggling of goods into a foreign country only if the foreign government has a reciprocal law. *See* 18 U.S.C. § 546. The statute also provides for sentences limited to a fine of not more than two years imprisonment. *See id.* By prosecuting smuggling under the wire fraud statute, the Executive circumvents both of these limitations, thus negating the Legislature's role in guiding foreign affairs. Despite the existence of Section 546, the Executive represented to the Fourth Circuit that the wire fraud statute has been made "the primary legal tool in the United States at this time" to combat smuggling from the United States into foreign countries. United States' Petition For Rehearing En Banc at 7, *United States v. Pasquantino*, 336 F.3d 321 (4th Cir. 2003) (Nos. 01-4463, 4464, 4465). This unilateral expansion of Section 1343 into an all-purpose international smuggling statute renders

Congress's enacted policy with regard to the prosecution of international smuggling a virtual dead letter.

B. Allowing the Executive to Engage in Selective Application of the Revenue Rule Has Serious Implications for the Treatment of U.S. Citizens Abroad and for the Conduct of International Business.

The revenue rule is not merely a principle of American jurisprudence, but a principle of international law, founded on an expectation of reciprocity. *See, e.g., R.J. Reynolds*, 268 F.3d at 122-23 (noting the importance of reciprocal recognition of the revenue rule to the treaty between the United States and Canada regarding extraterritorial tax collection); *Government of India v. Taylor*, [1955] A.C. 491, 508 (H.L.) ("[The revenue rule] is enforced with the knowledge that in foreign countries the same rule is observed."). Thus the issue presented in this case affects not merely whether our courts will be in the business of interpreting and applying foreign revenue law, but also whether foreign courts will be in the business of applying and interpreting U.S. revenue law. The import of the Fourth Circuit's en banc opinion in this case is that the United States will not hesitate to use a foreign country's tax laws as a basis for imposing domestic criminal sanctions where the Executive finds this to be in the interest of United States.

If this principle of selective executive application of the revenue rule becomes recognized as U.S. legal doctrine, other nations may well choose to adopt the same position. Thus foreign governments wishing to harass U.S. citizens or to interfere with U.S. business interests may take this case as a signal that they are free to criminally prosecute American citizens and businesses abroad for putative violations of U.S. tax law. This could result, for example, in Americans being tried for alleged violations of the Internal Revenue Code under procedures of foreign governments that do not comport with the procedural rules contemplated by the Internal Revenue Code, the Federal Rules of Criminal Procedure or the U.S. Constitution. Americans could face criminal sanctions in foreign countries for violations of U.S. law that would not give rise to the same sanctions here. The questions whether Congress effected such a radical change in foreign relations simply by enacting the wire fraud statute, and whether the Executive Branch may effect such a change unilaterally despite the existence of the revenue rule and enactments of Congress that bespeak a contrary policy, are important matters that this Court should address.

This case also has chilling implications for all U.S. businesses that are involved in international transactions. The result of the Fourth Circuit's holding in this case is that U.S. citizens and corporations can be prosecuted for wire fraud for scheming to avoid payment of taxes to a foreign government, regardless of whether those taxes would ever actually have accrued. *See* App. 20a ("Proof that the Defendants personally owed such taxes is not required under the wire fraud statute as long as there was proof that they participated in a fraudulent scheme to enable someone to avoid such taxes."). At the same time, defendants can be sentenced on the basis of a federal court's estimation as to how much in taxes *would have* been owed under the foreign revenue law. *See id.* 24a-26a. Under the reasoning of this case, any time a U.S. business takes an aggressive position regarding its foreign tax obligations, it conceivably risks being charged with "scheming" to deprive a foreign sovereign of tax revenue. In today's post-Enron climate of corporate skepticism, the mere possibility of such criminal liability may have a significant *in terrorem* effect that prevents U.S. companies from taking legitimate positions regarding their foreign tax liabilities.

C. The Fourth Circuit's Opinion Allows Courts to Convict and Sentence U.S. Citizens on the Basis of Mere Inferences that an Applicable Revenue Law Existed and that the Defendant Knew how it Would Be Applied.

In *Pierce*, the Second Circuit recognized that to prove a scheme to defraud a foreign sovereign of its right to be paid revenue, the prosecution must prove beyond a reasonable doubt that such a revenue law actually existed at the time of the alleged scheme. *See* 224 F.3d at 166. In the present case, the indictment alleged a scheme beginning in March 1997 and ending in April 2000. *See* App., 58a. The last wire communication alleged in the indictment took place in October of 1999. *See* App. 63a-64a. The only evidence that was offered as to the actual existence of an applicable revenue law, however, was in the form of testimony by a Canadian Customs officer. This officer testified in September 2000, nearly a full year after the last alleged wire communication that is a subject of the indictment. Her testimony is silent as to the laws existing in Canada at the time of the alleged scheme. App. 54a-56a. She was asked only to describe "what, if any, taxes or duties are due and owing on alcohol that is imported from the United States into Canada," and her testimony on this score was entirely in the present tense.[19] The Fourth Circuit acknowledged that the officer's testimony "did not specifically state that the taxes of which she was

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[19] *See* App. 55a:

> Alcohol is taxed very high in Canada. There is an excise tax, that is a federal tax, that is applied, depending on the value of it, the U.S. purchase price. There is a general sales tax that is also a federal tax. There is a Liquor Control Board of Ontario tax. And there is also a provincial sales tax."

The Canadian officer did not offer any testimony that the Canadian government had made an assessment of the amounts owed.

speaking were in force at the time of the Defendants' conduct," but nevertheless found it sufficient to support a finding of guilt. App. 19a. According to the Fourth Circuit, the "context" of the officer's testimony—in particular, her testimony that she had been assigned to investigate Petitioners—supported a finding that the laws about which she testified had been in place at the relevant time. *Id.* The existence and construction of foreign revenue law were thus treated, not as questions of law, but as questions of fact, which a jury could decide on the basis of inferences drawn from testimony and without any direct evidence of the law itself or the existence of an assessment under the law.

Even more troubling in the present case is the manner in which Petitioners' sentences were enhanced on the basis of the officer's testimony regarding the application of Canadian revenue law. The officer testified that the Canadian taxes that would be due and owing on a case of alcohol purchased in the United States for $56 would be "[s]omewhere around $100." App. 56a. Nowhere was the basis for this calculation explained. More importantly, at no time did the prosecution even attempt to establish that Petitioners had any understanding as to the actual amount of taxes they would have had to pay had the alcohol been declared at the border. Nevertheless, the court used the officer's unsubstantiated testimony as to this amount in calculating Petitioners' "intended loss" for sentencing purposes. *See* App. 24a-26a.

As the Fourth Circuit noted, "intended loss" as a basis for sentencing is entirely distinct from the "amount of loss actually possible, or likely to occur as a result of the defendant's conduct." App. 24a (citing *United States v. Miller*, 316 F.3d 495, 502 (4th Cir. 2003)). The caselaw cited by the Fourth Circuit makes clear that "intended loss" means "the pecuniary harm that was intended to result from the offense," *see Miller*, 316 F.3d at 503 (quoting U.S.S.G. § 2B1.1, cmt. n.2(A)(ii)(2001)). *See also id.* at 498 (district court did not

err "in using *the amount he intended to obtain* to compute the loss attributable to his fraud") (emphasis added). A finding of "intended loss" should therefore be based on evidence that a defendant consciously attempted to obtain or divert a particular sum or sums of money, not on the amount a revenue officer calculates after the fact and about which the defendant has no knowledge. *See, e.g., United States v. Geevers*, 226 F.3d 186, 193 (3d Cir. 2000) (basing "intended loss" on the face value of defendant's fraudulent checks).

In the case of Petitioner Hilts, the court arrived at the sum of money attributed to him as an "intended loss" by taking the number of cases of alcohol he was found to have transported in conjunction with the scheme, and multiplying it by the tax rate testified to by the Canadian officer—without any evidence that Hilts had had any knowledge what this rate was or what the actual tax would come to. Thus Hilts—who had not purchased or transported across the border any alcohol himself—was found to have "intended" a loss to Canada of $1,167,600 based solely on the inference that he was aware the cases he transported within the United States were destined to be smuggled into Canada. *See* App. 26a. How Hilts could have known, much less "intended," that Canada would be defrauded of this particular sum, however, is left unaddressed and unexplained. The Fourth Circuit's approach to this case thus not only allows the existence of an applicable revenue law to be inferred, it allows a defendant to be sentenced based on an inferred understanding as to the exact workings of that law.

Moreover, the Fourth Circuit's method of calculating "intended loss" belies the assertion that Petitioners' prosecution for wire fraud is merely a vindication of the government's interest in preventing fraudulent use of the nation's interstate wire communication systems, in which the role played by foreign revenue law is "merely incidental." *See* App. 13a-14a. The base guideline sentencing range for wire fraud is 0-6 months. The enhancements based on application of Canadian revenue law, however, resulted in sentences of 57 months for the Pasquantinos and 21 months for Hilts. *See* App. 35a-36a (Gregory, J., dissenting). As the opinion signed by the two dissenting judges remarked, "Because the bulk of the defendants' sentences were related, not to the American crime of wire fraud, but to the Canadian crime of tax evasion, I conclude that this case was primarily about enforcing Canadian law." *Id.* at 36a.[20]

D. The Fourth Circuit's Reasoning in this Case Appears to Allow Foreign Sovereigns to Bring Civil RICO Suits to Collect Tax Revenues

As discussed above, wire fraud is a predicate racketeering offense that can provide the basis for a civil damages claim under RICO. *See* 18 U.S.C. § 1961(1). Therefore, if defrauding a foreign sovereign of tax revenue constitutes wire fraud, it also constitutes racketeering activity, and a foreign sovereign harmed by a pattern of such activity should be able to bring suit in federal court to recover damages.

The Second Circuit in *R.J. Reynolds* endeavored to avoid this logical result by asserting that in a civil damages suit the actual operation of the foreign revenue law would be at issue, whereas in a criminal wire fraud prosecution only the defendants' intent to defeat that law through fraud would be relevant to establishing the offense. *See* 268 F.3d at 108-09. This distinction, faulty though it is, was possible because the Second Circuit had accepted the First Circuit's premise that the revenue rule is violated when a domestic court passes on the validity and application of a foreign revenue law. *See Trapilo*, 130 F.3d at 552-53.

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[20] Ironically however, under Canadian law any imprisonment for violation of the Excise Act is limited to a term of "not more than two years." Excise Act, R.S. c. E-12, § 108 (Can.).

The Fourth Circuit's reasoning in this case appears to leave no such escape hatch open. The en banc court rejected the First Circuit's premise completely, and took the view that passing on the validity and operation of a foreign revenue law does not violate the revenue rule so long a U.S. court is enforcing something other than a foreign tax judgment. App. 11a-12a.

Accordingly, when Canada or some other foreign sovereign brings a civil RICO suit in the Fourth Circuit similar to the one Canada attempted to bring in *R.J. Reynolds*, the logic of the present case suggests that it will go forward. Unlike the Second Circuit, the Fourth Circuit is willing to apply foreign revenue law to calculate damages—it has already done so to calculate "intended loss." So long as the U.S. government has its own interest in prosecuting, the case may go forward. This is not reasoning that is capable of distinguishing a foreign government's RICO claim. Just as the United States has a "substantial interest in preventing our nation's interstate wire communication systems from being used in furtherance of criminal fraudulent enterprises," App. 13a-14a, so it also has substantial interests in preventing the channels of interstate commerce from being used to conduct racketeering enterprises, and in compensating the victims of such enterprises for the losses they sustain. If the Fourth Circuit applies its logic consistently, it will find to be "merely incidental" the fact that the losses in question would consist entirely of accrued but unpaid taxes owed under the foreign sovereign's revenue laws, and will allow such claims to proceed. *Id.*. The courts of this country should not become the world's tax courts, either though use of RICO or through criminal enforcement.[21]

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[21] *See* NAM Amicus Brief at 22 (warning against the danger of "transforming U.S. federal courts into the world's tax courts").

Only this Court can ensure that a consistent rule of law applies throughout the United States on these important questions of national law and international affairs.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

JENSEN E. BARBER
JENSEN E. BARBER & ASSOCS.
400 – 7th Street, N.W.
Washington, DC 20004
(202) 737-8511

Counsel for Petitioner
David B. Pasquantino

LAURA W. BRILL *
CHRISTOPHER NEWMAN
IRELL & MANELLA, LLP
1800 Avenue of the Stars
Los Angeles, California
90067
(310) 277-1010

Counsel for Petitioner
Arthur Hilts

BRUCE R. BRYAN
333 East Onondaga Street
Syracuse, New York 13202
(315) 476-1800

Counsel for Petitioner
Carl J. Pasquantino

* Counsel of Record

November 15, 2003

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 01-4463, 01-4464, 01-4465

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID B. PASQUANTINO,
Defendant-Appellant,

v.

CARL J. PASQUANTINO,
Defendant-Appellant,

v.

ARTHUR HILTS, A/K/A BUTCH,
Defendant-Appellant.

July 18, 2003.

OPINION

Before WILKINS, *Chief Judge*, WIDENER, WILKINSON, NIEMEYER, WILLIAMS, MICHAEL, TRAXLER, KING, GREGORY, and SHEDD, *Circuit Judges*, and HAMILTON, *Senior Circuit Judge*.

HAMILTON, *Senior Circuit Judge*:

David Pasquantino, Carl Pasquantino, and Arthur Hilts (collectively the Defendants) were convicted of using interstate wires for the purpose of executing a scheme to defraud Canada and the Province of Ontario of excise duties

and tax revenues relating to the importation and sale of liquor. According to the Defendants, their convictions and sentences cannot stand because, *inter alia*, application of the common law revenue rule precludes prosecution under the federal wire fraud statute, 18 U.S.C. § 1343, for use of interstate wires for the purpose of executing a scheme to defraud a foreign sovereign of its property rights in accrued tax revenue. Sitting *en banc*, we reject this argument and hold that the common law revenue rule does not preclude prosecution under the wire fraud statute for use of interstate wires for the purpose of executing a scheme to defraud a foreign sovereign of its property rights in accrued tax revenue. We also reject the Defendants' other arguments in challenge of their convictions and Hilts' challenge to his sentence. Accordingly, we affirm.

I.

Viewed in the light most favorable to the government, the evidence at trial revealed a substantial liquor smuggling operation beginning in 1996 and continuing through May 2000. No doubt this smuggling operation was spawned to supply a black market for liquor in Canada that had been created when, some years ago, Canada increased the sin taxes on liquor to such a level that Canadian taxes significantly exceeded comparable United States taxes.

Brothers David and Carl Pasquantino, residents of Niagara Falls, New York, devised and headed the smuggling operation, which constituted a scheme to defraud Canada and the Province of Ontario of excise duties and tax revenues relating to the importation and sale of liquor in Canada. The scheme to defraud generally operated as follows: (1) while in New York, Carl or David Pasquantino would place a large order for low-end liquor by telephone with a discount liquor store in Maryland; (2) a driver such as Arthur Hilts used a rented truck to pick up the liquor from the discount liquor store in Maryland and transport it to New York for storage;

and (3) a driver smuggled a lesser quantity of the liquor across the Canadian border in the trunk of a vehicle.

After agents from the United States Bureau of Alcohol, Tobacco, and Firearms (ATF agents) discovered that eight discount retail liquor stores in Maryland had purchased unusually large quantities of low-end liquor from wholesalers, a criminal investigation ensued. Two of the store owners cooperated proactively with ATF agents by recording telephone conversations and advising the agents of calls and visits by the Defendants.[1] Moreover, ATF agents obtained numerous telephone, truck rental, and motel records, all of which evidenced the scheme. Border crossings were monitored electronically, tracking license plates of vehicles entering Canada. Several vehicles that were registered to drivers involved in the scheme failed to stop for a second inspection when requested. ATF agents and Royal Canadian Mounted Police also conducted surveillance of David and Carl Pasquantino and their associates loading liquor in Maryland and unloading it in Canada after it was smuggled through Canadian customs. Marked bottles of liquor were recovered in Canada.

Subsequently, the Defendants were indicted, along with four other individuals, on six counts of wire fraud and aiding and abetting wire fraud, in violation of 18 U.S.C. §§ 2 and 1343.[2] The Defendants filed a pretrial motion to dismiss the

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[1] In exchange for their cooperation, the store owners were not prosecuted for violations of United States Department of Treasury Regulations which required that they record and report bulk sales of alcohol.

[2] At the time of the offenses charged in the indictment, the wire fraud statute provided, in relevant part:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire . . . communication in

indictment on the ground that the common law revenue rule barred their prosecution under the federal wire fraud statute. Alternatively, the Defendants grounded their dismissal motion on the basis that accrued tax revenue does not constitute property under the federal wire fraud statute. Following the district court's denial of the motion, the case proceeded to trial before a jury.

At trial, the eight Maryland liquor store owners testified for the government regarding their dealings with the Pasquantinos. Three identified Hilts as one of the drivers who picked up large orders of liquor for the Pasquantinos. In addition to the store owners, two men who had been involved in the scheme testified that they transported liquor for David and Carl Pasquantino from the United States into Canada, and that the Pasquantinos paid them cash for each run. Canadian Customs Intelligence Officer Gina Jonah (Officer Jonah) testified that there is a Canadian federal excise tax and general sales tax, as well as a Liquor Control Board of Ontario tax and a provincial sales tax on liquor imported from the United States into Canada. Officer Jonah, a seventeen-year veteran employee of Canadian Customs, explained that the equivalent of approximately one-hundred American dollars would be due and owing on a case of liquor that was purchased in the United States for fifty-six American dollars and imported into Canada. She stated that generally the amount of Canadian tax due is twice the purchase price of the case of liquor in the United States.

David and Carl Pasquantino were convicted on all six counts of the indictment and sentenced to fifty-seven months'

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interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both.

18 U.S.C. § 1343 (2000).

imprisonment on each count, to be served concurrently. Before the case was submitted to the jury, the district court dismissed all but Count I against Arthur Hilts. Hilts was convicted on that count and sentenced to twenty-one months' imprisonment. This timely appeal followed.

The Defendants' convictions were subsequently vacated by a two-to-one panel decision. *United States v. Pasquantino*, 305 F.3d 291 (4th Cir. 2002), *vacated and reh'g en banc granted*, (4th Cir. 2003). Upon the government's suggestion, a majority of full-time, active circuit judges voted to rehear the case *en banc*.

II.

The Defendants' primary argument is that the district court erred in denying their motion to dismiss because the common law revenue rule precludes their prosecution on federal wire fraud charges. The Defendants' argument presents an issue of first impression in the Fourth Circuit. To be clear, the issue is whether application of the common law revenue rule puts beyond the reach of the federal wire fraud statute, 18 U.S.C. § 1343, the use of interstate wires for the purpose of executing a scheme to defraud a foreign sovereign of its property rights in accrued tax revenue.

We begin our analysis of this issue by recognizing that its resolution depends in large measure upon determining the proper formulation of the common law revenue rule in American jurisprudence. Assuming *arguendo* that a government's right to accrued tax revenue constitutes property for purposes of the wire fraud statute (an issue we address in Part III of this opinion), the wire fraud statute, on its face, criminalizes the Defendants' conduct of engaging in a scheme to defraud Canada and the Province of Ontario of tax revenue. Under relevant Supreme Court precedent, the only circumstance under which we may hold that this conduct is beyond the reach of the wire fraud statute is if, at the time

Congress enacted the wire fraud statute in July 1952, well established common law provided that the courts of one sovereign were prohibited from recognizing the existence of the revenue laws of a foreign sovereign. *Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108, 111 S.Ct. 2166, 115 L.Ed.2d 96 (1991) ("where a common-law principle is well established ... the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident") (internal quotation marks and citations omitted). Without the existence of such well-established common law, our setting aside of the Defendants' convictions and sentences as posited by the Defendants would be *ultra vires*. *Id.* ("Courts do not, of course, have free rein to impose [common law] rules of preclusion, as a matter of policy, when the interpretation of a statute is at hand.").

A logical starting point in determining the proper formulation of the common law revenue rule in American jurisprudence is the Restatement (Third) of Foreign Relations Law of the United States (1987) (hereinafter "the Restatement"), which courts often rely upon as an authoritative exposition of the foreign relations law of the United States. *See, e.g., C & L Enters. Inc. v. Citizen Band Potawatomi Indian Tribe of OK*, 532 U.S. 411, 421 n. 3, 121 S.Ct. 1589, 149 L.Ed.2d 623 (2001); *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 796, 113 S.Ct. 2891, 125 L.Ed.2d 612 (1993); *United States v. Boots*, 80 F.3d 580, 587 (1st Cir. 1996); *Palma v. Verdeyen*, 676 F.2d 100, 106 n. 5 (4th Cir. 1982). Section 483 of the Restatement provides the following formulation of the common law revenue rule: "Courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states." The Restatement § 483.

The formulation of the common law revenue rule found in most case law is nearly identical to that of the Restatement. For example, in *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001), *cert. denied*, ___ U.S. ___, 123 S.Ct. 513, 154 L.Ed.2d 394 (2002), the Second Circuit described the common law revenue rule as "a longstanding common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns." *Id.* at 109. Similarly, the First Circuit, in *Boots*, stated that the common law revenue rule "holds that courts generally will not enforce foreign tax judgments ...." *Boots*, 80 F.3d at 587 (citing the Restatement § 483 as authority). The Ninth Circuit, in *Her Majesty the Queen ex rel. B.C. v. Gilbertson*, 597 F.2d 1161 (9th Cir. 1979), the first federal case ever to invoke the common law revenue rule in the international context, described the common law revenue rule as an exception to the general rule that judgments from a foreign country are recognized by the courts of this country when the general principles of comity are satisfied. *Id.* at 1163. And although the Supreme Court has never passed upon the precise scope of the common law revenue rule, in 1964, it noted that many courts in the United States have adhered to the principle that "a court need not give effect to the penal or revenue laws of foreign countries." *Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 413, 84 S.Ct. 923, 11 L.Ed.2d 804 (1964).

Some rationales commonly given for the formulation of the common law revenue rule as found in the Restatement and the case law in accord are: (1) the reluctance of courts to subject foreign public law to potentially embarrassing judicial scrutiny, *see, e.g., Her Majesty the Queen ex rel. B.C.*, 597 F.2d at 1164-65; (2) the courts of one nation have no obligation to further the governmental interests of a foreign nation, *see, e.g., Sabbatino*, 376 U.S. at 448, 84 S.Ct. 923 (White, J., dissenting on other grounds); and (3) the noninterference by the judicial branch in matters of foreign

policy which fall within the exclusive province of the executive and legislative branches of our federal government, *see, e.g., Attorney Gen. of Canada*, 268 F.3d at 114.

The Defendants discount the Restatement's formulation of the common law revenue rule and that of the case law in accord as too narrow and merely evincing the typical application of the rule. The actual rule, they claim, is much broader and provides that no nation, under any circumstances, shall ever recognize the tax laws of a foreign sovereign. The Defendants then argue that because their convictions on the wire fraud charges in this case would necessarily require an American court to recognize certain revenue laws of Canada and the Province of Ontario, the common law revenue rule precludes their prosecution. Thus, as applied in the present case, the Defendants view the common law revenue rule as an absolute prohibition on American courts from recognizing a revenue law of a foreign sovereign in any context.

The Defendants cite the separation of powers rationale and the avoid embarrassment rationale as the two rationales for their version of the common law revenue rule. Additionally, they posit that application (of their version) of the common law revenue rule to vacate their wire fraud convictions and sentences serves both of these rationales.

In support of their broad formulation of the common law revenue rule, the Defendants rely on *dicta* in two eighteenth-century, British contract cases written by Lord Mansfield. The first case is *Holman v. Johnson*, 98 Eng. Rep. 1120 (K.B. 1775). The subject of the contract in *Holman* was the sale of tea in France, which tea the parties knew was to be smuggled into England to avoid English customs duties. The French seller sued the English buyer in England to recover the purchase price. *Id.* The English buyer argued in defense that the contract was void for an illegal purpose. *Id.*

Lord Mansfield first determined the conflict of laws issue in that case as follows:

> There can be no doubt, but that every action tried here must be tried by the law of England; but the law of England says, that in a variety of circumstances, with regard to contracts legally made abroad, the laws of the country where the cause of action arose shall govern. There are a great many cases which every country says shall be determined by the laws of foreign countries where they arise. But I do not see how the principles on which that doctrine obtains are applicable to the present case. *For no country ever takes notice of the revenue laws of another.*

Id. at 1121 (emphasis added). Lord Mansfield then discussed whether the French seller had engaged in an illegal act:

> This is an action brought merely for goods sold and delivered at Dunkirk[, France]. Where then, or in what respect is the plaintiff guilty of any crime? Is there any law of England transgressed by a person making a complete sale of a parcel of goods at Dunkirk, and giving credit for them? The contract is complete, and nothing is left to be done.

Id. Clearly, Lord Mansfield's statement concerning whether a country would recognize the revenue laws of a foreign sovereign was not made in the context of his decision on the merits of the case, but on the choice of law issue. Indeed, in the words of one legal commentator, such statement "was not directed to the merits of the case; it was not necessary to decide the case, and was therefore dictum." William J. Kovatch, Jr., *Recognizing Foreign Tax Judgments: An argument for the revocation of the revenue rule*, 22 Hous. J. Int'l L. 265, 276 (2000). *See Her Majesty the Queen ex rel. B.C.*, 597 F.2d at 1164 (characterizing as *dictum* Lord Mansfield's

statement in *Holman* regarding whether a country would recognize the revenue laws of a foreign sovereign).

The second case upon which the Defendants rely is *Planche v. Fletcher*, 99 Eng. Rep. 164 (1779). The plaintiff in *Planche* obtained insurance for cargo aboard a ship in England ultimately bound for France. *Id.* Following destruction of the cargo, the plaintiff sued the insurance company for payment and won. *Id.*

On appeal, the insurance company challenged the verdict on the ground that the plaintiff had fraudulently obtained the insurance policy by declaring a false shipping route in order to avoid paying higher French duties on goods imported from England as compared to goods imported from Belgium. Lord Mansfield held that no fraud existed because "[w]hat had been practiced in this case was proved to be constant course of trade, and notoriously so to every body." *Id.* at 165. After eschewing the existence of any fraud on the part of the plaintiff, Lord Mansfield added in dictum: "But, at any rate, this was no fraud in this country. One nation does not take notice of the revenue laws of another." *Id. See Her Majesty the Queen ex rel. B.C.*, 597 F.2d at 1164 (characterizing as *dictum* Lord Mansfield's statement in *Planche* regarding whether a country would recognize the revenue laws of a foreign sovereign).

The Defendants have two significant problems with relying on *Holman* and *Planche* as authority for defining the common law revenue rule as a prohibition on the courts of one nation from recognizing the revenue laws of a foreign sovereign in any context. The first significant problem is that the statements they rely upon in the two cases are pure and simple dicta, and, therefore, cannot serve as a source of binding authority in American jurisprudence. *See, e.g.*, *Alexander v. Sandoval*, 532 U.S. 275, 282, 121 S.Ct. 1511, 149 L.Ed.2d 517 (2001) ("[T]his Court is bound by holdings,

not language."); *Kokkonen v. Guardian Life Ins. Co.*, 511 U.S. 375, 379, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) ("It is to the holdings of our cases, rather than their dicta, that we must attend . . . ."); *United States v. Dixon*, 509 U.S. 688, 706, 113 S.Ct. 2849, 125 L.Ed.2d 556 (1993) (quoting *United States Nat. Bank of Or. v. Independent Ins. Agents of Am., Inc.*, 508 U.S. 439, 463, n. 11, 113 S.Ct. 2173, 124 L.Ed.2d 402 (1993), on "'the need to distinguish an opinion's holding from its dicta' "). The second significant problem is that the two rationales that the Defendants cite in support of their expansive version of the common law revenue rule are not even traceable to *Holman* and *Planche*. Rather, the statements by Lord Mansfield in those cases upon which the Defendants rely have as their sole rationale the protection of British trade from the oppressiveness of high foreign customs duties. *See Attorney Gen. of Canada*, 268 F.3d at 110; William S. Dodge, *Breaking the Public Law Taboo*, 43 Harv. Int'l L.J. 161, 170 (2002).

In short, *Holman* and *Planche* are inadequate authority for the proposition that, at the time Congress enacted the wire fraud statute in 1952, it was well-established at common law that the courts of one nation could never recognize the revenue laws of a foreign sovereign. Indeed, all persuasive authority supports the position that the Restatement's formulation of the common law revenue rule and that of the case law in accord reflects the formulation of the common law revenue rule in existence at the time that Congress enacted the wire fraud statute in 1952. Critically, such formulation speaks in permissive not mandatory terms and pertains to the nonenforcement of foreign tax judgments as opposed to the nonrecognition of foreign revenue laws.[3]

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[3] The dissent relies on this sentence to charge that rather than applying the Restatement's formulation of the common law revenue rule as stated, we have "narrow[ed] its application only to those rare instances in which a court is compelled to actually enforce the judgment of a foreign court."

Under these circumstances, we cannot presume that when Congress enacted the wire fraud statute in 1952, it did so with the intent that any prosecution thereunder could not involve recognition or observance of the revenue laws of a foreign sovereign. *Astoria Fed. Sav. & Loan Ass'n*, 501 U.S. at 108, 111 S.Ct. 2166. Without such a presumption, we have no basis upon which to ignore the plain language of the wire fraud statute, which language (assuming *arguendo* that a sovereign's right to tax revenue constitutes property for purposes of the wire fraud statute) squarely encompasses the Defendants' conduct.

The Defendants make a related alternative argument that even application of the Restatement version of the common law revenue rule requires that we vacate their convictions and sentences under the wire fraud statute, asserting that our affirmance of their convictions and sentences would be the functional equivalent of enforcing the revenue laws of Canada and the Province of Ontario.

We candidly acknowledge that the Defendants' argument is not without support. In *Boots*, the defendants had been convicted of wire fraud for their participation in a scheme, using interstate wires, to defraud Canada and the Province of Nova Scotia of excise duties and tax revenues due on imported tobacco. *Boots*, 80 F.3d at 583. The First Circuit vacated the convictions in large measure on the basis that

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Post at 338. The dissent completely misreads the sentence, which expressly recognizes that the Restatement's formulation of the common law revenue rule "speaks in permissive not mandatory terms." Further-more, the dissent's charge misses the critical distinction between the nonenforcement (or nonrecognition) of *foreign tax judgments*, as is addressed in the Restatement's formulation of the common law revenue rule, with the nonenforcement (or nonrecognition) of *foreign revenue laws*, which is not at all addressed in that formulation. The distinction is critical because prosecution of the Defendants depended neither upon the enforcement nor recognition of a foreign tax judgment.

"upholding defendants' section 1343 conviction[s] would amount functionally to penal enforcement of Canadian customs and tax laws" in violation of the common law revenue rule. *Id.* at 587. The First Circuit reached this conclusion on the basis that conviction of the defendants effectively required it and the district court to pass upon the validity and operation of a foreign sovereign's revenue laws, thus implicating the important concerns underlying the common law revenue rule.[4] *Id.* According to the First Circuit, national policy judgments of the legislative and executive branches in the area of foreign policy could be undermined, and the revenue laws of a foreign sovereign subjected to intrusive scrutiny, were federal courts to uphold prosecutions of wire fraud schemes aimed at violating the revenue laws of a foreign sovereign. *Id.* at 587-88.

We reject the Defendants' argument that affirmance of their convictions and sentences for wire fraud would be the functional equivalent of enforcing the revenue laws of Canada and the Province of Ontario, and thus in violation of the common law revenue rule. In making this argument, the Defendants, and the First Circuit in *Boots* for that matter, miss the critical point that prosecution for violation of the federal wire fraud statute, even when the subject of the wire fraud scheme involved is certain tax revenue due a foreign sovereign, does nothing civilly or criminally to enforce any tax judgments or claims that the foreign sovereign has or may later obtain against the defendant. Neither does such prosecution enforce the revenue laws of the foreign sovereign involved. Rather, such prosecution seeks only to enforce the federal wire fraud statute for the singular goal of vindicating our government's substantial interest in preventing our nation's interstate wire communication systems from being

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[4] Notably, the *Boots* court relied upon the Restatement as authority for defining the common law revenue rule as follows: [C]ourts generally will not enforce foreign tax judgments . . . . *Boots*, 80 F.3d at 587.

used in furtherance of criminal fraudulent enterprises. Thus, the fact that the property at issue in the Defendants' wire fraud scheme belonged to foreign governments by virtue of those governments' respective revenue laws is merely incidental to prosecution under the federal wire fraud statute.

Moreover, affirming the Defendants' wire fraud convictions and sentences in this case presents no separation of powers problems, the only rationale of the common law revenue rule with jurisdictional underpinnings. Congress enacted the wire fraud statute and the United States Attorney, acting on behalf of the United States as directed by the Executive Branch, made the decision to seek the Defendants' indictment thereunder. Thus, to the extent matters of foreign policy were implicated by prosecution of the Defendants on the wire fraud charges in this case, such matters were passed upon by the only two branches of our federal government charged by our Constitution with the power to make foreign policy decisions. *Chicago & S. Air Lines, Inc. v. Waterman S.S. Corp.*, 333 U.S. 103, 111, 68 S.Ct. 431, 92 L.Ed. 568 (1948) (declaring that decisions as to foreign policy "are wholly confided by our Constitution to the political departments of the government, Executive and Legislative"). However, we have no doubt that a significant separation of powers problem would arise were we to play diplomat from the bench by relying on a novel expansion of the common law revenue rule, no doubt a policy laden rule, to set aside the Defendants' wire fraud convictions and sentences.

We find strong support for our rejection of the Defendants' arguments involving the common law revenue rule in *United States v. Trapilo*, 130 F.3d 547 (2d Cir.1997). In that case, the Second Circuit considered whether a scheme (essentially identical to the one before us) to defraud Canada of tax revenue is cognizable under the federal wire fraud statute, 18 U.S.C. § 1343. *Trapilo*, 130 F.3d at 548. The Second Circuit held that "[t]he statute neither expressly, nor impliedly,

precludes the prosecution of a scheme to defraud a foreign government of tax revenue, and the common law revenue rule, inapplicable to the instant case, provides no justification for departing from the plain meaning of the statute." *Id.* at 551.

In sum, we hold the district court did not err in denying the Defendants' motion to dismiss the indictment, which motion the Defendants premised upon their argument that the common law revenue rule precludes their prosecution for wire fraud.

III.

The Defendants next argue that under the Supreme Court's decision in *Cleveland v. United States*, 531 U.S. 12, 121 S.Ct. 365, 148 L.Ed.2d 221 (2000), a government's right to collect accrued tax revenue is not a property right for purposes of the wire fraud statute. In this regard, the Defendants rely on the following language from *Cleveland*: "It does not suffice, we clarify, that the object of the fraud may become property in the recipient's hands; for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim." *Cleveland*, 531 U.S. at 15, 121 S.Ct. 365.

The Defendants' reliance on this language in Cleveland is completely misplaced. The defendant in *Cleveland* was prosecuted under the mail fraud statute (sister of the wire fraud statute), 18 U.S.C. § 1341, for making false statements in applying to the Louisiana State Police for a license to operate video poker machines.[5] The Supreme Court held that permits or licenses of this order do not qualify as "property" for purposes of the mail fraud statute. *Id.* at 16, 26-27, 121 S.Ct. 365. The Court reached this holding on the bases that

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[5] Because the mail and wire fraud statutes share the same language in relevant part, we apply the same analysis to both offenses. *Carpenter v. United States*, 484 U.S. 19, 25 n. 6, 108 S.Ct. 316, 98 L.Ed.2d 275 (1987).

the property at issue had to be property that was valuable in the hands of the victim, not just valuable in the hands of the defendant, and that an unissued video poker license did not constitute property that was valuable in the hands of the State of Louisiana.[6] *Id.* at 22-27, 121 S.Ct. 365.

In contrast to the facts in *Cleveland*, because a government has a property right in tax revenues when they accrue, *see Manning v. Seeley Tube & Box Co.*, 338 U.S. 561, 566, 70 S.Ct. 386, 94 L.Ed. 346 (1950), the tax revenues owed Canada and the Province of Ontario by reason of the Defendants' conduct in the present case constitute property for purposes of the wire fraud statute. *United States v. Brewer*, 528 F.2d 492, 495 (4th Cir. 1975) (holding that plain language of the mail fraud statute "condemns any scheme to defraud in which the mails are employed, *including the evasion of sales and use taxes*") (emphasis added). Indeed, the Court in *Cleveland* conspicuously pointed out that the government in that case had "nowhere allege[d] that Cleveland defrauded the State of any money to which the State was entitled by law." *Cleveland*, 531 U.S. at 22, 121 S.Ct. 365. In sum, we hold that Canada and the Province of Ontario's right to accrued tax revenue constitutes a sufficient property right for wire fraud purposes, unaffected by the Court's decision in *Cleveland*.

IV.

The Defendants make several challenges to the sufficiency of the evidence in support of their convictions. We review the sufficiency of the evidence to support a conviction by determining whether there is substantial evidence in the record, when viewed in the light most favorable to the government, to support the conviction. *United States v.*

[6] Indeed, a great deal of the Court's opinion is devoted to a discussion of why an unissued video poker license is of no monetary value to the State of Louisiana. *Cleveland*, 531 U.S. at 20-25, 121 S.Ct. 365.

Burgos, 94 F.3d 849, 860 (4th Cir. 1996) (*en banc*). In determining whether the evidence in the record is substantial, we examine whether there "is evidence that a reasonable finder of fact could accept as adequate and sufficient to support a conclusion of a defendant's guilt beyond a reasonable doubt." *Id.* at 862. We are also mindful that our reversal of a conviction on grounds of insufficient evidence is " 'confined to cases where the prosecution's failure is clear.'" *United States v. Jones*, 735 F.2d 785, 791 (4th Cir. 1984) (quoting *Burks v. United States*, 437 U.S. 1, 17, 98 S.Ct. 2141, 57 L.Ed.2d 1 (1978)).

Wire fraud is established through the existence of a scheme to defraud and the use of interstate wires in furtherance of that scheme. *United States v. Bollin*, 264 F.3d 391, 407 (4th Cir. 2001), *cert. denied*, 534 U.S. 935, 122 S.Ct. 303, 151 L.Ed.2d 225 (2001) and 535 U.S. 989, 122 S.Ct. 1544, 152 L.Ed.2d 469 (2002). The scheme or artifice to defraud can be in the form of an assertion of a material falsehood with the intent to deceive or active concealment of a material fact with the intent to deceive. *United States v. Colton*, 231 F.3d 890, 899-901 (4th Cir. 2000). A fact is material if it has a natural tendency to influence or is capable of influencing the intended victim. *Neder v. United States*, 527 U.S. 1, 22, 24, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999). *Cf. United States v. Gaudin*, 515 U.S. 506, 509, 115 S.Ct. 2310, 132 L.Ed.2d 444 (1995); *Kungys v. United States*, 485 U.S. 759, 770, 108 S.Ct. 1537, 99 L.Ed.2d 839 (1988).

A. *Materiality.*

The Defendants contend that, assuming *arguendo* they had engaged in a scheme to defraud Canada and the Province of Ontario of excise duties and tax revenues by virtue of a liquor smuggling operation, the evidence was insufficient to establish that such scheme depended upon a material falsehood or active concealment of a material fact. We disagree. Reasonable inferences from the evidence at trial establish that

the Defendants' scheme depended in large measure upon their purposeful routine failure to declare their possession of imported liquor when asked to declare any "goods that [they had] entering Canada" by a Canadian Customs Officer in the Primary Inspection Line at the United States/Canadian border. (J.A. 179). We have no doubt that such failure to declare was capable of influencing Canadian Customs Officers to allow vehicles containing concealed liquor to proceed on into Canada without further inspection by Canadian Customs Officials for the purpose of identifying goods subject to excise duties and taxes. Accordingly, we hold the evidence was sufficient to establish their active concealment of a material fact with intent to deceive. *Cf. Brewer*, 528 F.2d at 496 (defendant's scheme to sell cigarettes into another state through the mail without registering with tax officials in that state, as required by the Jenkins Act, in order that purchasers in that state could avoid paying sales taxes on the cigarettes constitutes mail fraud).

B. *Existence of Tax Laws.*

Next, the Defendants contest the sufficiency of the evidence to establish that liquor imported into Canada and the Province of Ontario is subject to excise duties and other taxes. The Defendants argue that without such evidence the government failed to show that the wire fraud scheme charged in this case sought to deprive Canada or the Province of Ontario of any property interest. In a similar vein, the Defendants also argue that the evidence was insufficient to prove that they personally owed Canada or the Province of Ontario any taxes in connection with the liquor that they are alleged to have smuggled.

We reject these arguments. First, we hold that the evidence was sufficient to prove beyond a reasonable doubt that liquor imported into Canada and the Province of Ontario was subject to excise duties and other applicable taxes at the time

of the Defendants' conduct as charged in this case. The evidence is in the form of trial testimony by Officer Jonah. Based upon her seventeen years of employment experience with Canadian Customs, Officer Jonah testified that she was familiar with the rules and regulations that pertain to the importation of alcoholic beverages into Canada. Then, in answer to government counsel's request that she describe for the court and the jury what, if any, taxes or duties are due and owing on alcohol that is imported from the United States into Canada, Officer Jonah testified as follows:

> Alcohol is taxed very high in Canada. There is an excise tax, that is a federal tax, that is applied, depending on the value of it, the U.S. purchase price. There is a general sales tax that is also a federal tax. There is a Liquor Control Board of Ontario tax. And there also is a provincial sales tax.

(J.A. 177). Officer Jonah further testified that, in preparation for her testimony, she calculated that the Canadian and Province of Ontario taxes that would be due and owing on a case of imported alcohol that was purchased in the United States for fifty-six American dollars would be approximately one hundred American dollars, which converts to approximately 157 Canadian dollars.

Even though Officer Jonah did not specifically state that the taxes of which she was speaking were in force at the time of the Defendants' conduct as charged in this case, the context of her entire testimony permitted the jury to draw this reasonable inference. For example, Officer Jonah was assigned to investigate the Defendants on suspicion of liquor smuggling based upon their conduct as charged in this case. In sum, we have no reservations that the evidence at trial was sufficient to prove beyond a reasonable doubt that liquor imported into Canada and the Province of Ontario was subject to excise duties and other applicable taxes at the time of the Defendants' conduct as charged in this case.

Second, the Defendants' challenge to the sufficiency of the evidence establishing that they personally owed Canada or the Province of Ontario any taxes in connection with the liquor that they are alleged to have smuggled completely misses the mark. Proof that the Defendants personally owed such taxes is not required under the wire fraud statute as long as there was proof that they participated in a fraudulent scheme to enable someone to avoid such taxes. *Cf. Brewer*, 528 F.2d at 496 (where defendant knowingly devised mail fraud scheme to enable Florida residents to obtain cigarettes without declaring them for taxation, it was no defense to mail fraud prosecution that defendant herself owed no tax). The testimony of Officer Jonah that we just discussed serves as such proof in this case. Indeed, from the testimony of Officer Jonah and the overall context in which it was given in relation to the joint United States and Canadian investigation which led to this prosecution, it was a reasonable inference that the Canadian taxes were due by the importer upon importation of liquor into Canada. The jury found and at trial the Defendants never challenged the proposition that such taxes were due by the importer. Nonetheless, as we recognized in *Brewer*, the defendant could not avoid prosecution under the federal mail fraud statute on the ground that she herself owed no taxes on the cigarettes she smuggled into Florida from North Carolina. *Id.* The quintessential element is that the scheme in the present case involved defrauding the Canadian authorities of revenue taxes on imported liquor regardless of what party had responsibility for the payment of those taxes. The precise time when the taxes are owed and whom they are due from are not elements of the offense. What is required is proof that such taxes were due and the conduct involved a scheme to defraud the Canadian authorities of the taxes.

C. *Hilts' Participation.*

Finally, we address Hilts' specific challenge to the sufficiency of the evidence to support his conviction on Count I.

Count I charged the substantive crime of wire fraud, 18 U.S.C. § 1343, and the adjunct crime of aiding and abetting wire fraud, 18 U.S.C. § 2.[7] Pursuant to 18 U.S.C. § 2, one who aids or abets the commission of an offense "is punishable as a principal." We have held that "[a] defendant is guilty of aiding and abetting if he has knowingly associated himself with and participated in the criminal venture." *United States v. Burgos*, 94 F.3d 849, 873 (4th Cir.1996) (*en banc*) (internal quotation marks omitted). Significantly, in order "to be convicted of aiding and abetting, participation in every stage of an illegal venture is not required, only participation at some stage accompanied by knowledge of the

[7] As a housekeeping matter, we note that although the written judgment for Hilts specifies that he was convicted of Count I of the indictment, it does not specify the statutory section for aiding and abetting, nor does it describe the nature of the offense with respect to Count I as aiding and abetting. Rather, it only specifies the statutory section for wire fraud and describes the nature of the offense with respect to Count I as "WIRE FRAUD." (J.A. 351). Given that Count I of the indictment charged Hilts with aiding and abetting wire fraud along with the substantive offense of wire fraud, the district court instructed the jury on aiding and abetting with respect to Count I, Hilts' counsel discussed the aiding and abetting aspect of Count I in his closing argument before the jury, and the jury returned an unequivocal oral verdict finding Hilts guilty of Count I, we have no doubt that the failure of the written judgment to specifically reflect the aiding and abetting aspect of Count I was a clerical error. However, such detail need not concern us further in this appeal. The written judgment's explicit reference to Count I of the indictment sufficiently incorporates 18 U.S.C. § 2 for our purposes. *See United States v. Allen*, 675 F.2d 1373, 1385 (9th Cir. 1980) (although Count III of indictment charged defendant with aiding and abetting while written judgment of Count III only specifically cited the substantive offense, the written judgment's provision that the defendant was convicted of Count III "*as charged in Count 3 of the indictment*," was sufficient to incorporate 18 U.S.C. § 2). We do point out, however, that pursuant to Federal Rule of Criminal Procedure 36, the district court has the authority to correct the mistake. Fed. R. Crim. P. 36 (After giving any notice it considers appropriate, the court may at any time correct a clerical error in a judgment . . . arising from oversight or omission).

result and intent to bring about the result." *Id.* (internal quotation marks and alteration marks omitted). Of particular relevance here, to be convicted of aiding and abetting a wire fraud offense, it is not necessary for the defendant to be directly or personally involved in the wire communication as long as the wire communication was reasonably foreseeable to the defendant in the execution of the alleged scheme to defraud in which the defendant is accused of participating. *United States v. Griffith*, 17 F.3d 865, 874 (6th Cir. 1994).

The specific interstate communication charged as the basis for Count I was a telephone call from David Pasquantino in Niagara Falls, New York, to Valley Wine and Spirits in Hagerstown, Maryland, on March 9, 1999. David's brother Carl was also charged as a participant in the wire fraud scheme set forth in Count I. According to the indictment, the wire fraud scheme to defraud Canada and the Province of Ontario of excise duties and other taxes as charged in Count I began in or about March 1997 and lasted until the date of indictment, April 13, 2000.

Hilts primarily challenges the sufficiency of the evidence to establish that he knowingly and willfully participated in the wire fraud scheme charged in Count I with knowledge of its fraudulent nature. He claims that his conduct in picking up the large loads of liquor from the various discount liquor stores in Maryland was completely innocent, and points out that there is no evidence that he ever picked up any liquor from Valley Wine and Spirits nor any evidence linking him to the telephone call charged as the basis for Count I.

The government's theory at trial was that Hilts participated in the wire fraud scheme charged in Count I as a pick up and delivery driver with knowledge that the liquor he was handling would ultimately be smuggled into Canada without paying Canada or the Province of Ontario the applicable taxes. We hold the evidence in the record is sufficient to sustain Hilts' conviction on Count I. Viewed in the light most favorable to the government, the evidence in the record shows that, between February 27, 1997 and April 22, 1998, Hilts rented a Ryder truck in Niagara Falls, New York, from the same business (Gaines Sunoco), on average every two weeks; traveled in the truck between 738 and 978 miles (usually around 815 miles); and returned the truck the very next day. Hilts resumed almost the identical pattern of behavior in November 1998 and continued it until April 28, 1999, when, after detecting that he was under surveillance by ATF agents from the time he had left BJ's liquor store in Maryland until he had arrived in upstate New York, Hilts abandoned the Ryder truck that he had rented the day before on the side of the road. At the time that Hilts abandoned the truck, it contained 222 cases of liquor. Prior to abandoning the truck, Hilts successfully made several evasive driving maneuvers in order to escape the surveillance.

The record also shows that during these same time periods, Hilts used the rented trucks to pick up large bulk orders of liquor from two different Maryland liquor stores (neither of them Valley Wine and Spirits) for Carl Pasquantino.[8] The record also shows that from September 23, 1998 to April 9, 1999, a vehicle registered to Hilts made thirty-nine trips from Niagara Falls, New York across the Rainbow Bridge into the Canadian Province of Ontario. However, such trips ceased completely after Hilts abandoned the Ryder rental truck on April 28, 1999.

Viewing the evidence just recited in the light most favorable to the government, we hold that a reasonable finder of fact could accept such evidence as adequate and sufficient to support a conclusion beyond a reasonable doubt that Hilts

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[8] One of the store owners (*i.e.*, the owner of BJ's Liquors) testified that Hilts always picked up the large bulk sale orders placed by Carl Pasquantino in a Ryder rental truck and that the first several times Hilts arrived at his store, Hilts already had cases of the same type of liquor on the truck.

knowingly participated at various stages in the wire fraud scheme charged in Count I with knowledge that the liquor he was transporting would ultimately be smuggled into Canada without paying Canada or the Province of Ontario the applicable taxes due on such liquor. The fact that Hilts abandoned the liquor laden rental truck after detecting surveillance by ATF agents during a liquor run from Maryland to New York is strong evidence of his criminal intent. The same goes for his evasive driving maneuvers and the fact that his own vehicle did not cross the Rainbow Bridge after April 28, 1999. Furthermore, the mere fact that Hilts did not personally make the telephone call that is specifically alleged in Count I is of no import. The evidence supports a reasonable inference that the March 9, 1999 telephone call by David Pasquantino to Valley Wine & Spirits was reasonably foreseeable to Hilts in the execution of the fraudulent scheme alleged in Count I. *Griffith*, 17 F.3d at 874.

V.

Finally, we address Hilts' challenge to his twenty-one month sentence. Hilts contends that the district court clearly erred in calculating his fraud loss for purposes of determining his proper offense level under USSG § 2F1.1, the fraud guideline. His contention is without merit.

USSG § 2F1.1(a) provides a base offense level of six. USSG § 2F1.1(b)(1) provides for incremental increases to that base offense level based upon the amount of "*Loss*," "[i]f the loss exceeded $2,000." District courts are permitted to use the *intended loss* to the victim of the fraudulent scheme at issue as the basis for determining "*Loss*" under USSG § 2F1.1(b)(1), "even if this exceeds the amount of loss actually possible, or likely to occur, as a result of the defendant's conduct." *United States v. Miller*, 316 F.3d 495, 502 (4th Cir. 2003).

Of relevance to Hilts' sentencing challenge, under the heading "Offense Conduct," his Presentence Report (PSR) states that the government provided "this Probation Officer" with the following version of evidence and facts provided at trial:

> Testimony at trial established that defendant picked up liquor at Liquor Locker, JRJ Liquors, and BJ's Liquors until April 28, 1999. The cases from Liquor Locker will not be considered. Adding the cases from JRJ Liquors with those from BJ's through April 28, 1999, totals 12,974 cases. Applying a factor of 90% results in 11,676 cases. The loss for guideline purposes is thus $1,167,600.

(S.J.A., Vol. II, 9). The same section of the PSR also states that Hilts was taking the position that the evidence at trial could not support any amount of fraud loss. The PSR listed "+11 or 0" as the number of offense levels by which to increase Hilts' base offense level in connection with USSG § 2F1.1(b)(1)(L).

At sentencing, after hearing argument from Hilts' attorney, the district court stated:

> I need not hear from [the government] on the amount of loss. I am persuaded from the evidence in trial that the amount of loss attributed by the government set forth in the Presentence Report is correct. And so far as the argument that Mr. Hilts contemplated that this would only stay within the United States, that was a fair argument. It was considered by the jury, which found beyond a reasonable doubt that it wasn't so. So accordingly, on the amount of loss, I need not hear from the government.

(Transcript of Hilts' Sentencing Hearing at 10-11). The district court ultimately adopted all of the proposed findings of the PSR with one exception not relevant here.

We may overturn the district court's $1,167,000 fraud loss finding with respect to Hilts only if we determine that it is clearly erroneous. *United States v. Bolden*, 325 F.3d 471, 495-96 (4th Cir. 2003). Hilts attacks the district court's fraud loss finding chiefly on the basis that the record contains no evidence that he actually transported or assisted others in importing the liquor that he had picked up in Maryland into Canada. We reject this argument. Proof that Hilts actually transported or assisted others in importing the liquor that he picked up in Maryland into Canada is not required, while it is reasonably inferred from the number of times a vehicle registered to Hilts crossed into Canada and then ceased such activity immediately after Hilts abandoned the liquor laden rental truck. Rather, all that is required to support the district court's fraud loss finding is sufficient evidence from which to make a reasonable inference that Hilts intended that such liquor would eventually be smuggled into Canada in order to avoid paying Canada and the Province of Ontario the applicable excise duties and other taxes. The evidence that we discussed in support of Hilts' conviction on Count I, when viewed collectively, constitutes such evidence. In sum, we affirm Hilts' sentence.

VI.

In conclusion, we affirm the Defendants' convictions and Hilts' sentence.[9]

AFFIRMED

[9] We have reviewed the Defendants' remaining assignments of error and find them to be without merit.

GREGORY, Circuit Judge, dissenting:

I.

Pursuant to the common-law revenue rule, I find that the activities at issue in this case are not cognizable under the federal wire-fraud statute, 18 U.S.C. § 1343. Accordingly, I respectfully dissent.

II.

A.

The majority claims to rely on the Restatement's formulation of the revenue rule, which states, "Courts in the United States are not required *to recognize* or enforce judgments for the collection of taxes . . . rendered by the courts of other states." *Ante*, at 327 (citing Restatement (Third) of the Law of Foreign Relations § 483) (emphasis added). Rather than applying this rule as stated, however, the majority narrows its application only to those rare instances in which a court is compelled to actually enforce the judgment of a foreign court, finding that the rule only "pertains to the *nonenforcement* of foreign tax judgments . . . ." *Ante*, at 329 (emphasis added). In so holding, the majority reads the words "to recognize" completely out of the Restatement section on which it purportedly relies. With its constrained application of the revenue rule, the majority has created new law that does not find support in the Restatement, Supreme Court precedent, nor in any of the rulings from our sister circuits.

In *Banco Nacional de Cuba v. Sabbatino*, the Supreme Court suggested that the revenue rule would reach beyond actual enforcement of foreign tax judgments, and extend to any case in which a court would be compelled to "give effect to the . . . revenue *laws* of foreign countries or sister states." 376 U.S. at 412, 413, 84 S.Ct. 923 (1964) (citing *Moore v.*

Mitchell, 30 F.2d 600 (2d Cir. 1929)) (emphasis added). Predating *Banco Nacional de Cuba*, the Court in *Milwaukee County v. M.E. White Company*, although not ultimately deciding the case on revenue rule grounds, specifically recognized that:

> [i]t has often been said, and in a few cases held, that statutes imposing taxes [as opposed to judgments enforcing those statutes] are not entitled to full faith and credit . . . because the courts of one state should not be called upon to scrutinize the relations of a foreign state with its own citizens, such as are involved in its revenue laws, and thus commit the state of the forum to positions which might be seriously embarrassing to itself or its neighbors.

296 U.S. 268, 274-75 (1935) (internal footnotes omitted). In sum, long before Congress' passage of the wire fraud statute at issue in the present case, "the United States Supreme Court acknowledged the broad scope of the revenue rule." *Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 126 (2d Cir. 2001) (citing *Milwaukee Co.*, 296 U.S. at 275, 56 S.Ct. 229).

Additionally, the First Circuit, in *United States v. Boots*, held that the revenue rule is implicated when a United States court is called upon to "effectively pass[ ] on the validity and operation of the revenue laws of a foreign country." 80 F.3d 580, 587 (1st Cir. 1996). In *Boots*, the defendants took part in a scheme to transport tobacco from a Native American reservation in upstate New York into New Brunswick, Canada, without paying taxes and excise duties on the tobacco. To bypass customs checkpoints, the tobacco was transported surreptitiously into Canada through another reservation in Maine. The defendants were charged with and found guilty of conspiracy to commit wire fraud, in violation of 18 U.S.C. §§ 371 and 1343. The First Circuit reversed the convictions, basing its decision primarily on the revenue rule.

Id. at 583-84. The Court explained, "Although this case does not require us to enforce a foreign tax judgment as such, upholding defendants' section 1343 conviction would amount functionally to penal enforcement of Canadian customs and tax laws." *Id.* at 587. With this decision, the First Circuit recognized that the revenue rule applies not only when a foreign law is being enforced, but also when, as the Restatement suggests, an American court is compelled to "recognize" the validity of that foreign law. The *Boots* court continued:

> The scheme to defraud at issue—proof of which is essential to conviction—had as its sole object the violation of Canadian revenue laws. To convict therefore, the district court and this court must determine whether a violation of Canadian tax laws was intended and, to the extent implemented, occurred. In so ruling, our courts would have to pass on defendants' challenges to such laws and any claims not to have violated or intended to violate them.

Id. at 587.

Although it declined to exercise its discretion and dismiss the indictment before it, the Second Circuit, in *United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997), applied the same formulation of the revenue rule as did the *Boots* court. The *Trapilo* court found that because "there is no obligation to pass on the validity of Canadian revenue law, . . . the common law revenue rule is not properly implicated." *Trapilo*, 130 F.3d at 552-553. That is, the court recognized the converse—had it been required to pass on the validity of a foreign tax law, the revenue rule would have been implicated. This would be true, the court implicitly conceded, even if it

had *not* been required to enforce a judgment based on an application of that law.[10]

This statement of the rule was reaffirmed by the Second Circuit in *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, where the court held, "[U]nder the revenue rule, United States courts avoid the application of a foreign sovereign's tax laws" in order to "avoid entanglement with questions about the underlying validity of a foreign sovereign's laws." 268 F.3d at 126. While acknowledging that "the precise scope of the rule" remains an unanswered question of federal law, *id.* at 109, the court nevertheless determined that "sound policy considerations, including international comity, the proper exercise of sovereign powers, institutional competence and separation of powers, and recognition of the U.S.-Canada tax treaty relationship, support the continuing viability and application of the revenue rule to this case," *id.* at 126.

The First and Second Circuit's recitations of the revenue rule, along with the Supreme Court's understanding of the doctrine, are buttressed by the rule's common law history. At least since the eighteenth century, courts have appreciated the broad scope of the rule, which provides that "[o]ne nation does not take notice of the revenue laws of another." *Planche v. Fletcher*, 99 Eng. Rep. 164, 165 (1779). Even more

[10] As explained in Part II.B., *infra*, although the *Trapilo* court correctly summarized the common-law revenue rule, the court erred in its application of the rule. In fact, the court's ruling in *Trapilo*, which reversed the district judge's decision to dismiss the indictment against the defendants, was called into doubt by the Second Circuit's subsequent decision in *United States v. Pierce*, 224 F.3d 158 (2d Cir. 2000), where the court reversed the convictions of two of the *Trapilo* defendants. The *Trapilo* ruling was further limited by the Second Circuit's opinion in *Attorney General of Canada*, where the court found "the *Boots* reasoning persuasive" in the context of a civil action, and that, as a result, the circuit's earlier reasoning in *Trapilo* was "not controlling here." 268 F.3d at 123-24.

forcefully, in the case of *Holman v. Johnson*, Lord Mansfield recited what he regarded as a firmly established principle, that "no country *ever* takes notice of the revenue laws of another." 98 Eng. Rep. 1120, 1121 (K.B. 1775) (emphasis added). The majority disregards this history, explaining that Lord Mansfield's comments are dicta, and that, accordingly, they "cannot serve as a source of binding authority in American jurisprudence." *Ante*, at 329. The majority's argument, however, is unpersuasive, since I cite English common law, not as binding authority, but as persuasive evidence that courts have long since recognized that the revenue rule applies both to the nonenforcement of foreign tax judgments as well as to the nonrecognition of foreign revenue laws.

Notwithstanding this well-established precedent, both from the English and American courts, the majority crafts an exceedingly narrow view of the revenue rule, limiting its application only to those cases in which a United States court is compelled to actually enforce the collection of a foreign tax judgment, and prohibiting its use in any case requiring a United States Court to pass on the validity of, or give effect to, a foreign revenue law. Because this revision creates a circuit split on an issue where such a division is unwarranted, I dissent from the majority's formulation of the revenue rule.

B.

As is evident from the above discussion, the revenue rule is a discretionary doctrine, one that is guided by "constitutional and prudential considerations. . . ." *Boots*, 80 F.3d at 587. *See also Attorney Gen. of Canada*, 268 F.3d at 113 ("We do not suggest that the revenue rule always bars United States courts from furthering the tax policies of foreign sovereigns."); *Trapilo*, 130 F.3d at 550 (recognizing that "our courts will normally not enforce foreign tax judgments") (emphasis added); *Boots*, 80 F.3d at 587 (noting that "our courts have traditionally been reluctant to enforce foreign revenue laws") (emphasis added); *European Comty. v.*

R.J.R. Nabisco, Inc., 150 F.Supp.2d 456, 476 (E.D.N.Y. 2001) ("The revenue rule is discretionary rather than jurisdictional."); *Restatement (Third) of the Law of Foreign Relations*, § 483 (noting that courts are "not required" to apply the rule). As such, we need not apply the doctrine in every criminal prosecution simply because the prosecution may be colored by some aspect of a foreign revenue rule. In the present case, however, the traditional rationales underlying the rule forcefully support its application.

The rationale of the revenue rule, the First Circuit explained:

> has been said to be that revenue laws are positive rather than moral law; they directly affect the public order of another country and hence should not be subject to judicial scrutiny by American courts; and for our courts effectively to pass on such laws raises issues of foreign relations which are assigned to and better handled by the legislative and executive branches of government.

Boots, 80 F.3d at 587. Similarly, the Second Circuit recently noted that revenue laws "mirror the moral and social sensibilities of a society. Sales taxes, for example, may enforce political and moral judgments about certain products. Import and export taxes may reflect a country's ideological leanings and the political goals of its commercial relationships with other nations." *Attorney Gen. of Canada*, 268 F.3d at 111. Consistent with the well-articulated explanations from the First and Second Circuits, I believe the revenue rule bars wire fraud prosecutions that are premised upon schemes to violate foreign tax laws because "[n]o court ought to undertake an inquiry which it cannot prosecute without determining whether those [foreign revenue] laws are consonant with its own notions of what is proper." *Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir.1929) (Hand, J., concurring). That such an intrusive inquiry is required here

cannot be denied, as we must determine the validity and application of Canada's tax laws.

The United States, arguing that interpretation of foreign laws is unnecessary, relies on the Second Circuit's decision in *Trapilo*, where the court explained that the wire fraud statute proscribed the "use of the telecommunications systems of the United States in furtherance of a scheme whereby one *intends* to defraud another of property. Nothing more is required. The identity and location of the victim, and the success of the scheme, are irrelevant." 130 F.3d at 552 (emphasis in original). Based on this observation, the *Trapilo* court concluded that the revenue rule would be inapplicable to the government's wire fraud prosecution because "[a]t the heart of th[e] indictment [was] the misuse of the wires in furtherance of a scheme to defraud the Canadian government of tax revenue, not the validity of a foreign sovereign's revenue laws." *Id.* at 552.

The flaw in the *Trapilo* court's reasoning is transparent. The court recognized the need for evidence of a scheme to defraud another of property, but then erred by simply assuming that the property—Canada's right to tax revenues—existed. *Id.* at 552. The tax revenues would have existed, of course, only if the liquor at issue in *Trapilo* had been subject to the relevant revenue laws. That is, the existence of property necessarily depended upon the court's analysis of Canada's tax laws. The *Trapilo* court, as a matter of logic, actually did inquire into the validity of a foreign sovereign's tax laws, without even realizing that it had done so.

This failing in the *Trapilo* court's reasoning was recognized by the Second Circuit in *United States v. Pierce*, 224 F.3d 158 (2000), where the court stated:

> We did not say or suggest in *Trapilo*, however, that it did not matter whether Canada in fact taxed or levied a duty on liquor sales or imports, or that a guilty mind without something about which to feel guilty was a

> crime. And while we assumed in *Trapilo* that the government would be able to prove what the indictment alleged, we must on this appeal determine whether the government in fact did so at trial.

Id. at 167. The *Pierce* court then reversed the convictions before it, based on the insufficiency of the evidence, explaining:

> A scheme to deceive, however dishonest the methods employed, is not a scheme to defraud in the absence of a property right for the scheme to interfere with. . . . The Pierces are not accused of scheming to defraud the Canadian government of its property, but of its *right* to obtain property, its *right* to be paid money. To prove the existence of a scheme to defraud the Canadian government[,] the prosecution had to prove the existence of such a right.

Id. at 165 (emphasis in original).

Usually, both the identity of the victim and the success of the scheme are irrelevant to a wire fraud prosecution. *See Trapilo*, 130 F.3d at 552. When the victim is a foreign sovereign, however, these factors take on a new importance. In the present case, to determine whether there was a scheme to defraud another of *property*, this court would have to conclude that Canada's and Ontario's "right to be paid money" had materialized. *Pierce*, 224 F.3d at 165. That is, we would have to find that the defendants had succeeded in their scheme, at least in so far as to actually transport liquor across the Canadian-American border. Stated differently, had the defendants been captured before a single bottle of alcohol crossed into Canada, they could not have been prosecuted under the wire fraud statute because the requisite property would never have come into existence. *See id.* No foreign taxes would be owed.

It is inescapable that in passing on whether defendants intended to violate Canadian law and deprive Canada of its

right to taxes and duties owing on actually imported liquor, "our courts would have to pass on defendants' challenges to such laws and any claims not to have violated or intended to violate them." *Boots*, 80 F.3d at 587. The United States, in count one of the underlying indictment, charged, "At all times relevant to the Indictment, the governments of Canada and the Province of Ontario levied excise duties and taxes on the importation and sale of liquor." By alleging the existence of foreign revenue laws, the government effectively conceded that the applicability of Canadian law was central to its case.

The government reasserted the importance of these foreign excises during sentencing. In proposing sentences for the district court to consider, the prosecution turned not to the United States Sentencing Guidelines as one might expect, but rather to *Canadian revenue law*. The government concluded that "Canadian customs duties and excise taxes on a typical case of liquor [totaled] approximately $100 American." Based on its understanding of foreign law, the government then attempted to calculate the amount of tax revenue that would have been paid to foreign sovereigns had the liquor been lawfully imported into Canada. In figuring the tax losses for which David and Carl Pasquantino could be held responsible, the prosecution suggested the figure of $3,589,200.00. In making the same calculation in Arthur Hilts' case, the government arrived at the figure of $1,167,600.00.

The government's—and the court's—reliance on Canadian revenue law at sentencing is particularly revealing. The base offense level for a violation of 18 U.S.C. § 1343, is 6. For defendants with a criminal history category of I, the guideline range for a violation of the federal wire fraud statute is 0-6 months. The sentences received by the defendants, however, were substantially more severe. For each count of conviction, Carl and David Pasquantino were sentenced to 57 months of imprisonment, to be served concurrently, and Arthur Hilts

was sentenced to a term of 21 months for his conviction on count one of the indictment. The court arrived at these longer terms of imprisonment by increasing the defendants' offense levels based on the amount of loss to the victim, which in this case was the lost tax revenue to the Canadian and Ontario governments. The Pasquantinos' offense levels were increased by 13 and Arthur Hilts' offense level was increased by 11.[11] Because the bulk of the defendants' sentences were related, not to the American crime of wire fraud, but to the Canadian crime of tax evasion, I conclude that this case was primarily about enforcing Canadian law.

The court's reliance on the government's amount-of-loss computations is deeply troubling for another reason as well—the calculations were not based on any specific knowledge of what the tax liability would have been for the defendants. Instead, the court relied wholly on the testimony of Gina Marie Jonah, an intelligence officer with Canadian Customs. Officer Jonah, who was not offered as an expert witness, testified as to the approximate amount of tax that is generally owed on liquor imported into Canada. She commented, "Alcohol is taxed very high in Canada," but she did not reference any provisions of Canadian law in making this observation. Rather, based on her experience in working at the border, she surmised that on a case of alcohol worth $56 American, Canadian taxes would probably equal $100 American.

The district court never determined whether Officer Jonah's calculations were accurate as a matter of Canadian law. Notwithstanding this uncertainty, the court relied on

[11] In addition to the 13 and 11-level adjustments mentioned above, each of the defendants received an upward adjustment of 2 levels for a crime that involved more than minimal planning. The Pasquantinos received an additional 4-level increase for their organizing role in the offense. Arthur Hilts received a 3-level decrease for his minimal role in the offense.

these calculations to determine the defendants' offense levels under the Sentencing Guidelines. Of course, had it engaged in a more detailed application of foreign tax law, the court could have clarified the ambiguity regarding the amount of loss to the Canadian government. Yet that inquiry would have required precisely the kind of analysis that the common-law revenue rule seeks to avoid.

III.

Lastly, it must be noted that applying the revenue rule in this case would not mean that any of the defendants would go unpunished; they have all been indicted in Canada for two breaches of Canadian criminal law: (1) failure to file excise taxes; and (2) possession of unlawfully imported spirits. The Executive should determine whether to extradite the defendants to Canada to face these charges. The Canadian courts could then decide the issue that is at the core of both the American and Canadian prosecutions: whether, and to what extent, the defendants have defrauded the governments of Canada and Ontario out of tax revenues owed pursuant to their own, sovereign, excise laws.

Judge Michael joins in this dissent.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Nos. 01-4463, 01-4464, 01-4465

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

DAVID B. PASQUANTINO,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

CARL J. PASQUANTINO,
Defendant-Appellant.

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ARTHUR HILTS, A/K/A BUTCH,
Defendant-Appellant.

September 30, 2002

OPINION

Before GREGORY, Circuit Judge, HAMILTON, Senior Circuit Judge, and Gerald Bruce LEE, United States District Judge for the Eastern District of Virginia, sitting by designation.

GREGORY, Circuit Judge:

Appellants were indicted and convicted of engaging in a scheme to defraud the governments of Canada and the Province of Ontario of excise duties and tax revenues applicable to the importation and sale of liquor. They assert that the district court erred in denying their pretrial motion to dismiss the indictment because a scheme to defraud a foreign government of duties and taxes is not cognizable under the wire fraud statute, 18 U.S.C. § 1343.[12] We agree with this assertion, and for the reasons that follow, we reverse appellants' convictions.

I.

Years ago, after Canada increased the sin taxes on alcohol and cigarettes to such a level that Canada's taxes greatly exceeded comparable United States taxes, a Canadian black market for such goods emerged. Capitalizing on this situation, appellants David and Carl Pasquantino, residents of Niagara Falls, New York, developed a scheme where, with the help of drivers such as appellant Arthur Hilts, they would purchase large quantities of low end liquor from discount liquor stores in Maryland, transport the liquor to New York,

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[12] Appellants also contend that their motion for judgment of acquittal should have been granted because the evidence presented at trial was insufficient to support a wire fraud conviction. Appellant Hilts further argues that if the conviction is upheld, he is entitled to a new sentencing because the district court failed to make a determination as to the scope of his jointly undertaken criminal activity. Because we resolve this case on appellants' first contention, that the indictment should have been dismissed, we need not address these secondary arguments.

store it there, and then smuggle the liquor into Canada in the trunks of cars. While all applicable Maryland and federal taxes were paid on the liquor, there is no evidence that any Canadian taxes or duties were ever paid on the liquor that was transported into Canada. The enterprise began in 1996 and continued through May 2000.

The Bureau of Alcohol, Tobacco and Firearms (BATF) was alerted to the scheme after agents, routinely tracking Maryland liquor purchases, discovered that eight retail liquor stores in Maryland were buying unusually large quantities of lower cost liquors from wholesalers. A criminal investigation ensued, with two of the store owners cooperating proactively with investigating agents.[13] These store owners recorded telephone conversations, and advised agents of calls and visits from appellants.

BATF agents obtained numerous telephone, truck rental, and motel records, all of which evidenced the scheme.[14] Border crossings were monitored electronically, tracking license plates of vehicles entering Canada. Several vehicles, registered to drivers involved in the scheme, failed to stop for a second inspection when requested. BATF and Royal Canadian Mounted Police also conducted surveillance on David and Carl Pasquantino and their associates loading liquor in Maryland and unloading it in Canada after it was smuggled through customs. Marked bottles of liquor were recovered in Canada.

Appellants were indicted, along with four other individuals, on six counts of wire fraud, in violation of 18 U.S.C.

[13] In exchange for their cooperation, the store owners were not prosecuted for violations of U.S. Department of Treasury Regulations that they record and report bulk sales of alcohol.

[14] David and Carl Pasquantino made numerous interstate telephone calls from Niagara Falls, New York to Hagerstown, Maryland in order to place large liquor orders with the discount stores in Maryland.

§ 1343.[15] They filed a motion to dismiss the indictment on the ground that the district court lacked subject matter jurisdiction, arguing that a scheme to defraud a foreign government of tax revenues is not cognizable under the wire fraud statute. The district court denied the motion and the case proceeded to jury trial.

At trial, the eight Maryland liquor store owners testified for the government about their dealings with the Pasquantinos. In addition to the store owners, two men who had been involved in the scheme testified that they transported liquor for David and Carl Pasquantino from the United States into Canada, and that the Pasquantinos paid them cash for each run. Canada Customs intelligence officer Gina Jonah testified that there is a Canadian federal excise tax and general sales tax, as well as a Liquor Control Board of Ontario tax and a provincial sales tax on liquor imported from the United States into Canada. J.A. 177 78. Officer Jonah, a seventeen year employee with Canada Customs, explained that the equivalent of approximately $100 in United States currency would be due and owing on a case of liquor that was purchased in the United States and imported into Canada. She stated that generally the amount of Canadian tax due is twice the purchase price of the case of liquor in the United States.

David and Carl Pasquantino were convicted on all six counts of the indictment and sentenced to 57 months imprisonment on each count, to be served concurrently. Before the case was submitted to the jury, the district court dismissed all but Count I against Arthur Hilts. Hilts was

[15] They were also indicted in Canada for failure to file excise taxes and possession of unlawfully imported spirits, though the status and disposition of the Canadian charges is not evident in the record provided to us.

convicted on that count and sentenced to 21 months. This appeal followed.

II.

The threshold question here involves whether a scheme to evade the taxes of another country can be prosecuted as wire fraud by the United States government. Appellants argue that the trial court erred in denying their motion to dismiss the indictment. When reviewing the denial of a motion to dismiss an indictment, this Court reviews the district court's factual findings for clear error and its legal conclusions *de novo*. *See United States v. Ward*, 171 F.3d 188, 193 (4th Cir. 1999). Because the issue involves a pure question of law, whether the scheme alleged in the indictment is cognizable under the wire fraud statute, our review here is *de novo*. *See United States v. United Medical and Surgical Supply Co.*, 989 F.2d 1390, 1398 (4th Cir. 1993).

III.

Wire fraud requires proof of 1) a scheme to defraud, and 2) the use of a wire communication in furtherance of that scheme.[16] *See United States v. Bollin*, 264 F.3d 391, 407 (4th Cir. 2001). The Supreme Court has been clear that the mail and wire fraud statutes are limited in scope to schemes aimed at causing deprivation of money or property. *See McNally v. United States*, 483 U.S. 350 (1987). Appellants argue that

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[16] At the time of the offense, the wire fraud statute provided:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire . . . communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both . . . .

18 U.S.C. § 1343 (2000).

1) Canada's tax revenues do not qualify as "property" within the scope of the wire fraud statute, and 2) the prosecution is barred by the principles underlying the common law revenue rule.

A.

Appellants first argue that under the Supreme Court's recent decision in *Cleveland v. United States*, 531 U.S. 12 (2000), Canada's right to collect taxes and duties is not a property right for purposes of the wire fraud statute. Appellants point to language from *Cleveland*, where the Court explains, "[i]t does not suffice, we clarify, that the object of the fraud may become property in the recipient's hands; for purposes of the mail fraud statute, the thing obtained must be property in the hands of the victim."[17] *Cleveland*, 531 U.S. at 15. Appellants' reliance on this statement evinces a misunderstanding of *Cleveland*. In *Cleveland*, the Court held that an unissued video poker license held by a state did not constitute property. *Id.* at 20. Though the license becomes the property of the licensee (the recipient) after it is issued, a government regulator does not part with property when it issues a license. *Id.* In other words, the license in *Cleveland* was *never* capable of being property in the hands of the *victim*. On the other hand, it is well established that "property" may comprise both tangible and intangible property rights, *see Carpenter v. United States*, 484 U.S. 19, 25 (1987), and that a government has a property right in tax revenues when they accrue, *see Manning v. Seeley Tube & Box Co.*, 338 U.S. 561, 566 (1950). *Cleveland* does not say otherwise. Indeed, (*Cleveland* recognized that the government "nowhere allege[d] that Cleveland defrauded the State of any money to which the state was entitled by law."

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[17] Because the mail and wire fraud statutes share the same language in relevant part, we apply the same analysis to both offenses. *Carpenter v. United States*, 484 U.S. 19, 25 n.6 (1987).

Cleveland, 531 U.S. at 22. Here, it was alleged that Canada was defrauded of tax revenues it was entitled to by law.[18] Canada's right to collect taxes is therefore a sufficient property right for wire fraud purposes, unaffected by the Court's decision in *Cleveland*.

B.

Though Canada's right to collect taxes is a property right for Cleveland purposes, determination of whether Canada was actually or would have been *entitled to the tax revenues* involves an inquiry into the validity and operation of a foreign revenue law. We find that the principles underlying the revenue rule bar such an inquiry, and therefore bar appellants' prosecution in this case. Whether the revenue rule is applicable in wire fraud prosecutions is an issue of first impression in our circuit. Though we have not before considered the issue, two of our sister circuits have done so, and have reached dramatically different conclusions. The First Circuit, in *United States v. Boots*, 80 F.3d 580 (1st Cir. 1996), dismissed a similar indictment, while the Second Circuit has upheld convictions for schemes to defraud a foreign government of tax revenues, *United States v. Trapilo*, 130 F.3d 457 (2d Cir. 1997). As evidenced by the split in authority, this issue presents a difficult question indeed. However, after careful review, we agree with the First Circuit

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[18] The alleged purpose of appellants' scheme was to defraud Canada of tax revenue. Though Canada's interest would not vest until appellants crossed the border, the fact remains that when the scheme came to fruition, if the appellants succeeded in completing border crossings without paying the duties (which they did here), Canada would be deprived of revenues. The tax debt would be property in Canada's hands. Because success of the scheme is irrelevant, *see Durland v. United States*, 161 U.S. 306, 315 (1896), the inquiry is whether, if the scheme succeeded, the victim here, the government of Canada, would have been deprived of something in which it held a property right. Here, it would have.

that a scheme to defraud a foreign government of tax revenues is not cognizable under the wire fraud statute. The indictment against appellants should have been dismissed by the district court.

In Boots, the defendants took part in a scheme to transport tobacco from a Native American reservation in upstate New York into New Brunswick, Canada, without paying taxes and excise duties on the tobacco. *Id.* at 583. To bypass customs checkpoints, the tobacco was transported surreptitiously into Canada through another reservation in Maine. *Id.* The defendants were charged with and found guilty of conspiracy to commit wire fraud, in violation of 18 U.S.C. § 371 and § 1343. *Id.* at 584. The First Circuit reversed the convictions, basing its decision primarily on the revenue rule. *Id.* The Court explained that the "rationale of the revenue rule has been said to be that revenue laws are positive rather than moral law; they directly affect the public order of another country and hence should not be subject to judicial scrutiny by American courts; and for our courts effectively to pass on such laws raises issues of foreign relations which are assigned to and better handled by the legislative and executive branches of government." *Id.*

The First Circuit further explained:

> [t]he scheme to defraud at issue—proof of which is essential to conviction—had as its sole object the violation of Canadian revenue laws. To convict therefore, the district court and this court must determine whether a violation of Canadian tax laws was intended and, to the extent implemented, occurred. In so ruling, our courts would have to pass on defendants' challenges to such laws and any claims not to have violated or intended to violate them. *Where a domestic court is effectively passing on the validity and operation of the revenue rules of a foreign country,* the important concerns underlying the revenue rule are implicated.

Id. (emphasis added). Of "particular concern" to the First Circuit was "the principle of noninterference by the federal courts in the legislative and executive branches' exercise of their foreign policymaking powers." *Id.* at 587 88.[19]

We agree with the First Circuit. When the United States attempts to punish a crime whose sole objective is the violation of another country's revenue laws, the "important concerns underlying the revenue rule" are indeed implicated. *Boots*, 80 F.3d at 587. Though this case "does not require us to enforce a foreign tax judgment as such, upholding [appellants'] section 1343 conviction would amount functionally to penal enforcement of Canadian customs and tax laws." *Id.*

The revenue rule is a "longstanding common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns." *Attorney General of Canada v. R.J Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 109 (2d Cir. 2001) (providing a detailed history of the revenue rule). As the Supreme Court has recognized, many courts in the United

[19] In addition to the revenue rule, the First Circuit also noted that the federal statute criminalizing the smuggling of goods into foreign countries punishes smuggling only if the foreign government has a reciprocal law. *Boots*, 80 F.3d at 588; *see* 18 U.S.C. § 546. It opined that a decision to uphold the wire fraud convictions "would have the effect of licensing prosecutions against persons who use the wires to engage in smuggling schemes against foreign governments irrespective of whether a particular government had the reciprocal arrangement called for in section 546." *Id.* "Effect cannot be given to section 1343 in these conditions without threatening the reciprocity provision of section 546, and offending generally the salutary principles underlying the revenue rule." *Id.* The Court then found its conclusion further supported by the "rule of lenity," stating that if Congress "had meant to authorize the courts to enforce this kind bf application of the wire fraud statute, 'it must speak more clearly than it has.'" *Id.* (citing *McNally v. United States*, 483 U.S. 350, 360 (1987)).

States have adhered to the principle that a court need not give effect to the penal or revenue laws of foreign countries. *See Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 413 14 (1964). In this case, the act of smuggling liquor into Canada to avoid import taxes is deplorable. The appellants' scheme was a money making one, with the governments of Canada and Ontario as the victims. However, the fact remains that this prosecution involves Canada's tax laws. As the Second Circuit recently explained:

> [t]ax laws embody a sovereign's political will. They create property rights and affect each individual's relationship to his or her sovereign. They mirror the moral and social sensibilities of a society. Sales taxes, for example, may enforce political and moral judgments about certain products. Import and export taxes may reflect a country's ideological leanings and the political goals of its commercial relationships with other nations.

R.J. Reynolds, 268 F.3d at 111. We believe that there are essentially two reasons the revenue rule acts to bar wire fraud prosecutions for schemes to violate foreign tax laws.

First, we are of the opinion that "[n]o court ought to undertake an inquiry which it cannot prosecute without determining whether those laws are consonant with its own notions of what is proper." *Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929) (Hand, J., concurring). Expansion of the mail and wire fraud statutes to reach violations of foreign tax laws "risks turning federal prosecutors and investigators into de facto criminal law enforcement agents for [certain] foreign tax authorities." Kathryn Keneally, *The U.S. Prosecutes Foreign Tax Evasion as a Domestic Crime—With Far Reaching Consequences*, 88 J. Tax'n 224, 229 (April 1998). The revenue rule allows our courts to avoid becoming ensnared in the difficult decisions concerning which foreign tax laws we, through criminal prosecutions here, will help to

enforce.[20] The revenue rule should not be viewed as a means for guilty defendants to escape punishment, but rather it should be seen as an important protection mechanism for our courts.

Second, the revenue rule allows our courts to avoid interpreting and applying foreign tax laws. The government, arguing that interpretation of foreign laws is not needed here, relies on the Second Circuit's decision in *Trapilo*, 130 F.3d 457 (2d Cir. 1997), which categorically rejected the *Boots* decision. We find *Trapilo's* rationale to be flawed."[21] In its rejection of *Boots*, the Second Circuit explained that under the wire fraud statute, what is proscribed is the use of the wires "in furtherance of a scheme whereby one intends to

[20] In a wire fraud prosecution such as this, where the violation of foreign taxes is at issue, a decision will always have to be made regarding whether or not to prosecute. In the case at hand, the decision was probably an easy one, given 1) the United States' good relations with Canada, and 2) the fact that a tax on liquor is generally thought by most to be acceptable. Imagine, however, that appellants had engaged in a similar scheme to travel overseas and defraud Afganistan or Iraq of tax revenues. Must the United States also prosecute such similar schemes? Where do we draw the line as to which countries' laws we will help enforce? Furthermore, imagine that Canada imposed an import duty on bibles, and appellants schemed to smuggle bibles rather than liquor. The revenue rule was created in part to avoid these types of political and foreign policy based determinations. If we were to uphold appellants' convictions, our actions would at most run afoul of the principles underlying the revenue rule and at least encourage selective prosecution.

[21] In *Trapilo*, the defendants were charged in a one count indictment with money laundering conspiracy in violation of 18 U.S.C. § 1956(a)(1)(2) and (h). Reversing the district court's dismissal of the indictment, the Second Circuit found that the language of the wire fraud statute unambiguously prohibits the use of interstate or foreign communication systems by anyone who intends to "devise any scheme or artifice to defraud." *Trapilo*, 130 F.3d at 551 (emphasis in original). The Court noted that the statute neither expressly, nor impliedly, precludes the prosecution of a scheme to defraud a foreign government of tax revenue. *Id.*

defraud another of property. Nothing more is required. The identity and location of the victim, and the success of the scheme, are irrelevant." *Id.* at 552 (emphasis added)."[22] The Court stated that "the common law revenue rule, inapplicable to the instant case, provides no justification for departing from the plain meaning of the statute," because "[a]t the heart of this indictment is the misuse of the wires in furtherance of a scheme to defraud the Canadian government of tax revenue, *not the validity of a foreign sovereign's revenue laws.*"[23] *Trapilo*, 130 F.3d at 551-52 (emphasis added).

Generally, we would agree that the identity and location of the victim in a wire fraud case are irrelevant. However, when that victim is a foreign government, that identity takes on a new importance. Here, in order to determine whether Canada was deprived of property (tax revenues), a determination must be made into whether Canada's tax laws were in fact broken, or were *intended* to be broken. The Second Circuit opined that the validity of Canada's revenue laws is not an issue. Rather, it has found that all that is necessary to prosecute a defendant for wire fraud in the United States is evidence that Canada imposes a duty on imported liquor, i.e., evidence of the *existence* of a foreign tax or duty. *United States v. Pierce*, 224 F.3d 158, 166 (2d Cir. 2000). But recognizing the *existence* of a law is inherently and ines-

[22] The Court explained that the "intent to defraud does not hinge on whether or not defendants were successful in violating Canadian revenue law, as '[s]ection 1341 [as well as § 1343] punishes the scheme, not its success.'" *Trapilo*, 130 F.3d at 552 (citing *United States v. Helmsley*, 941 F.2d 71, 94 (2d Cir. 1991)).

[23] Though the Second Circuit has refused to apply the revenue rule in criminal wire fraud prosecutions, if has recognized the validity of the rule, and in fact used it to bar a civil RICO claim brought by the Attorney General of Canada to recover damages for lost tax revenues. *R.J. Reynblds*, 268 F.3d 103 (2d Cir. 2001). Unlike the *R.J. Reynolas* majority, we see "no basis in the revenue rule itself for treating criminal and civil cases differently." *Id.* at 138 (Calabresi, J., dissenting).

capably tied to recognizing the *validity* and *scope* of that law. Certainly, prosecuting a defendant for violations of a law, or for attempting to violate that law, requires an inquiry into the applicability and validity of the law.

It is inescapable that in passing on whether defendants intended to violate Canadian law and deprive Canada of its right to collect taxes and duties, "our courts would have to pass on defendants' challenges to such laws and any claims not to have violated or intended to violate them." *Boots*, 80 F.3d at 587. For example, a defendant accused of wire fraud may assert a defense of legal impossibility. If what a defendant intended to do was not a violation of the law, then certainly there could be no deprivation of property for wire fraud purposes. There would be no property right with which a defendant attempted to interfere. In such a case a *United States* court would be required to determine whether the defense to a *Canadian law* would lie.

In this case, the validity and operation of a foreign law is at issue. The Second Circuit, certainly justified in wanting to punish this smuggling scheme, has attempted to side step the important concerns underlying the revenue rule. We believe that the First Circuit took the better course, and we hold that a scheme to defraud a foreign government of tax revenues is not cognizable under the wire fraud statute.

IV.

For the foregoing reasons, we reverse appellants' convictions and remand to the district court with instructions to dismiss the indictment.

REVERSED

HAMILTON, Senior Circuit Judge, dissenting:

I fully agree with the majority opinion's holding that a government's right to collect taxes based upon its revenue laws is a sufficient property right for purposes of the federal

wire fraud statute, 18 U.S.C. § 1343. *Ante* at 7. However,, I sharply disagree with the majority opinion's holding "that a scheme to defraud a foreign government of tax revenues is not cognizable under the [federal] wire fraud statute." *Ante* at 12. Thus, on this second point, I respectfully dissent.

As the majority opinion acknowledges, "[t]he revenue rule is a 'longstanding common law doctrine providing that courts of one sovereign will not enforce final tax judgments or unadjudicated tax claims of other sovereigns.'" *Ante* at 9 (quoting *Attorney Gen. of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 109 (2d Cir. 2001)). The majority candidly admits that "this case 'does not require us to enforce a foreign tax judgment as such . . . .'" *Id.* (quoting *United States v. Boots*, 80 F.3d 580, 587 (1st Cir. 1996)). However, the majority opinion goes on to hold that the common law revenue rule bars the appellants' prosecution for the multiple federal wire fraud violations as charged in their indictment because such prosecution "'amount[s] functionally to penal enforcement of Canadian customs and tax laws.'" *Id.* (quoting *Boots*, 80 F.3d at 587). This holding by the majority rests upon flawed premises and is at odds with Supreme Court precedent. Accordingly, I am constrained to dissent.

Critically, prosecution of the appellants in this case for multiple violations of the federal wire fraud statute, 18 U.S.C. § 1343, *does nothing* civilly or criminally to enforce any tax judgments or claims that Canada or the Province of Ontario has or will obtain against the appellants based upon the appellants' conduct in this case. Rather, prosecution of the appellants *enforces a criminal statute enacted by the United States Congress and contained in the United States Code* that plainly prohibits the very conduct in which the appellants engaged i.e., the use of wire communications in the United States, in interstate or foreign commerce, for the purpose of executing a scheme or artifice to defraud another of its

property. Such enforcement has the singular goal of vindicating the intended purpose of the federal wire fraud statute "to prevent the use of [our telecommunication systems] in furtherance of fraudulent enterprises." *United States v. Trapilo*, 130 F.3d 547, 552 (2d Cir. 1997) (internal quotation marks omitted) (alteration in original). Here, the fact that the property at issue in the appellants' wire fraud scheme belonged to foreign governments by virtue of those governments' respective revenue laws is merely incidental to the application of the federal wire fraud statute. *Id.* (federal wire fraud statute proscribes use of telecommunication systems of the United States in furtherance of scheme whereby one intends to defraud another of property, and identity and location of victim are irrelevant). In short, the common law revenue rule does not require that we reverse the appellants' convictions and remand with instructions that the indictment be dismissed. *Id.* at 551 ("The [federal wire fraud] statute neither expressly, nor impliedly, precludes the prosecution of a scheme to defraud a foreign government of tax revenue, and the common law revenue rule . . . provides no justification for departing from the plain meaning of the statute.").

The majority holding is also at odds with Supreme Court precedent holding that federal courts are not free to alter the plain language of a federal statute as a matter of policy. *See Astoria Fed. Sav. & Loan Ass'n v. Solimino*, 501 U.S. 104, 108 (1991) ("Courts do not, of course, have free rein to impose [common law] rules of preclusion, as a matter of policy, when the interpretation of a statute is at hand."). Admittedly, "where a common law principle is well established . . . the courts may take it as given that Congress has legislated with an expectation that the principle will apply except when a statutory purpose to the contrary is evident." *Id.* (internal quotation marks and citations omitted). However, such is definitely not the situation here. There is simply no basis on which to reasonably conclude that prior to

Congress' enactment of the federal wire fraud statute on July 16, 1952, well established common law provided that the courts of one sovereign would not criminally prosecute a person who devised or intended to devise a wire fraud scheme to defraud a foreign sovereign of its property rights when such property rights are in the nature of accrued tax revenue. Accordingly, the majority opinion's holding that "a scheme to defraud a foreign government of tax revenues is not cognizable under the [federal] wire fraud statute," *Ante* at 12, is purely an imposition of its own expanded version of the common law revenue rule' on the federal wire fraud statute as a matter of judicial policy. As such, the majority opinion does nothing less than judicially rewrite the plain language of the wire fraud statute so that it no longer prohibits a person from devising or intending to devise a wire fraud scheme to defraud a foreign sovereign of its property rights when such property rights are in the nature of accrued tax revenues. Because federal courts have no authority to engage in such an exercise, I cannot agree with the majority opinion. I would affirm the appellants' convictions across the board.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

CRIMINAL CASE NO. JFM-00-202

UNITED STATES OF AMERICA

V.

DAVID B. PASQUANTINO
CARL J. PASQUANTINO
ARTHUR HILTS,

Defendants

Wednesday, February 7, 2001
Baltimore, Maryland

TRANSCRIPT OF TRIAL
HONORABLE J. FREDERICK MOTZ,
UNITED STATES DISTRICT JUDGE.

* * * * *

[133] MR. WELSH: Next witness will be Gina Jonah.
OFFICER GINA JONAH, GOVERNMENT WITNESS, SWORN

THE WITNESS: Yes, I do.

THE CLERK: Please be seated. Please speak directly into the microphone. State your full name for the record and spell your last name, please.

THE WITNESS: My name is Gina Marie Jonah. My last name is J-O-N-A-H.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. WELSH:

Q How are you employed, Ms. Jonah?

A I am employed through Canada Customs, the Intelligence [134] Division.

Q And what is your position called?

A I'm an intelligence officer.

Q How long have you been employed with Canada Customs?

A Seventeen years.

Q Are you familiar with the rules and regulations that pertain to the importation into Canada of alcoholic beverages?

A Yes, I am.

Q And would you describe for the Court and the jury what, if any, taxes or duties are due and owing on alcohol that is imported from the United States into Canada?

A Alcohol is taxed very high in Canada. There is an excise tax, that is a federal tax, that is applied, depending on the value of it, the U.S. purchase price. There is a general sales tax that is also a federal tax. There is a Liquor Control Board of Ontario tax. And there also is a provincial sales tax.

Q Now, in this case, in preparation for your testimony, did you calculate the taxes that would be due and owing on a case of alcohol that was purchased in the United States for $56 American?

A Yes, I did.

Q All right. And would you give us the results of your calculation? What taxes would be due and owing if that same case of alcohol were taken into Canada?

A $157.

Q Now, is that American or Canadian? [134]

A That is Canadian.

Q So that would be somewhat less than that in American, is that correct?

A Yes. That's correct.

Q Somewhere around $100?

A Correct. Yes.

Q Depending on the exchange rate at the moment, right?

A That's right. And the purchase price of the alcohol at the moment.

Q So is it fair to say roughly the amount of tax is twice the value of the case of liquor?

A Yes, it is.

* * * * *

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

UNITED STATES OF AMERICA

v.

DAVID B. PASQUANTINO
TERRY FRASER
FRANCIS A. GILLOTTI
GERARD T. CICCONE
COSMO D. CANDIDO
ARTHUR HILTS, a/k/a BUTCH

Criminal No JFM-00-0202

[Wire Fraud, 18 USC §1343; Aiding and Abetting, 18 USC §2; Interstate Transportation of Firearm with Intent to Commit a Felony, 18 USC §924(b)]

INDICTMENT

COUNT ONE

The Grand Jury for the District of Maryland charges that:

1. At all times relevant to this Indictment, (A) Valley Wine & Spirits Inc., 17301 Valley Mall Road, Hagerstown, Maryland 21740, (B) Thurmont Liquors Inc., 425 N. Church Street, Thurmont, Maryland 21786, (C) Tom & Map LLC t/a BJ's Liquors, 506 E. Ridgeville Boulevard, Mt. Airy, Maryland 21771, (D) JRJ Liquors Inc., 929 Pennsylvania Avenue, Hagerstown, Maryland 21742, (E) Central City Liquors Inc., 401 W. Washington Street, Hagerstown,

Maryland 21740, (F) Four Buttons Inc. t/a Buttons Liquor, 24 W. Ridgely Road, Lutherville, Maryland 21093, and (G) Franmar Inc. t/a Chocolate Park Tavern, 14449 McAfee Hill Road, Cascade, Maryland 21719 were licensed to conduct retail sales of liquor in the State of Maryland.

2. At all times relevant to the Indictment, the governments of Canada and the Province of Ontario levied excise duties and taxes on the importation and sale of liquor.

The Scheme to Defraud

3. From in or about March 1997 until the date of this Indictment, in the State and District of Maryland and elsewhere, the defendants

DAVID B. PASQUANTINO
CARL J. PASQUANTINO
TERRY FRASER
FRANCIS A. GILLOTTI
GERARD T. CICCONE
COSMO D. CANDIDO
and
ARTHUR HILTS a/k/a BUTCH

knowingly and willfully devised and intended to devise a scheme and artifice to defraud the governments of Canada and the Province of Ontario of excise duties and tax revenues relating to the importation and sale of liquor.

4. It was part of the scheme and artifice to defraud that the defendants and others known arid unknown to the Grand Jury participated in and operated an illegal venture to smuggle liquor from the United States into Canada without the payment of Canadian and Provincial excise duties and taxes.

5. It was part of the scheme and artifice to defraud that the defendants ordered by telephone and purchased in Maryland wholesale quantities of liquor from the liquor retailers listed in paragraph 1 above.

6. It was part of the scheme and artifice to defraud that the defendants rented and obtained trucks and vans to transport the liquor.

7. It was part of the scheme and artifice to defraud that the defendants transported, or caused the transportation of the liquor from Maryland to upstate New York and ultimately into Canada.

8. It was part of the scheme and artifice to defraud that the defendants maintained storage locations in upstate New York as staging areas for the smuggling of the liquor into Canada.

9. It was part of the scheme and artifice to defraud that the defendants made numerous interstate and international telephone calls in furtherance of the smuggling venture.

10. It was part of the scheme and artifice to defraud that the defendants traveled interstate and internationally in furtherance of the smuggling venture.

11. It was part of the scheme and artifice to defraud the defendants smuggled more than 39,000 cases of liquor into Canada, by hiding the liquor in vehicles which were driven across the border, thereby depriving the governments of Canada and the Province of Ontario or more than $5.8 million Canadian in excise duties and tax revenues.

12. It was part of the scheme and artifice to defraud that the defendant GERARD T. CICCONE carried a firearm with him while he was transporting liquor.

Execution of the Scheme to Defraud

13. On or about March 9, 1999, in the State and District of Maryland and elsewhere, the defendants

DAVID B. PASQUANTINO
CARL J. PASQUANTINO
TERRY FRASER
FRANCIS A. GILLOTTI

GERARD T. CICCONE
COSMO D. CANDIDO
and
ARTHUR HILTS a/k/a BUTCH

knowingly and willfully executed and attempted to execute the scheme to defraud, in that they caused signs, signals, and sounds to be transmitted by means of wire communication in interstate commerce, that is, a telephone call between telephone number 716-298-4734, listed to DAVID PASQUANTINO in Niagara Falls, New York. and telephone number 301-582-4444, located at Valley Wine and Spirits in Hagerstown, Maryland.

Title 18 U.S.C. §§1343 and 2

COUNT TWO

And the Grand Jury for the District of Maryland further charges that:

1. Paragraphs One through Twelve of Count One of this indictment are realleged and incorporated by reference as though fully set forth herein.

2. On or about June 5, 1999, in the State and District of Maryland, and elsewhere, the defendants

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CARL J. PASQUANTINO
TERRY FRASER
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GERARD T. CICCONE
COSMO D. CANDIDO
and
ARTHUR HILTS a/k/a BUTCH

knowingly and willfully executed and attempted to execute the scheme to defraud, in that they caused signs, signals, and sounds to be transmitted by means of wire communication in

interstate commerce, that is, a telephone call between telephone number 716-298-4734, listed to DAVID PASQUANTINO in Niagara Falls, New York, and telephone number 301-582-4444, located at Valley Wine and Spirits in Hagerstown, Maryland.

Title 18 U.S C. §§ 1343 and 2.

COUNT THREE

And the Grand Jury for the District of Maryland further charges that:

1. Paragraphs One through Twelve of Count One of this Indictment are realleged and incorporated by reference as though fully set forth herein

2. On or about September 20, 1999, in the State and District of Maryland and elsewhere, the defendants

DAVID B. PASQUANTINO
CARL J. PASQVANTINO
TERRY FRASER
FRANCIS A. GILLOTTI
GERARD T. CICCONE
COSMO D. CANDIDO
and
ARTHUR HILTS a/k/a BUTCH

knowingly and willfully executed and attempted to execute the scheme to defraud, in that they caused signs, signals, and sounds to be transmitted by means of wire communication in interstate commerce, that is, a telephone call between CARL J. PASQUANTINO in Niagara Falls, New York, and telephone number 301-829-2210, located in BJ's Liquors in Mt. Airy, Maryland.

Title 18 ,U S.C §§ 393 and 2.

COUNT FOUR

And the Grand Jury for the District of Maryland further charges that:

1. Paragraphs One through Twelve or Count One of this Indictment are realleged and incorporated by reference as though fully set forth herein.

2. On or about September 28, 1999, in the State and District of Maryland and elsewhere, the defendants

DAVID B. PASQUANTINO
CARL J. PASQVANTINO
TERRY FRASER
FRANCIS A. GILLOTTI
GERARD T. CICCONE
COSMO D. CANDIDO
and
ARTHUR HILTS a/k/a BUTCH

knowingly and willfully executed and attempted to execute the scheme to defraud, in that they caused signs, signals, and sounds to be transmitted by means of wire communication in interstate commerce, that is, a telephone call between CARL J. PASQUANTINO in Niagara Falls, New York, and telephone number 301-829-2210, located in BJ's Liquors in Mt. Airy, Maryland.

Title 18 U.S.C. §§ 1343 and 2.

COUNT FIVE

And the Grand Jury for the District of Maryland further, charges that:

1. Paragraphs One through Twelve of Count One of this Indictment are realleged and incorporated by reference as though fully set forth herein.

2. On or about October 2, 1999, in the State and District of Maryland and elsewhere, the defendants

DAVID H. PASQUANTINO
CARL J. PASQUANTINO
TERRY FRASER
FRANCIS A. GILLOTTI
GERARD T. CICCONE
COSMO D. CANDIDO
and
ARTHUR HILTS a/k/a BUTCH

knowingly and willfully executed and attempted to execute the scheme to defraud, in that they caused signs, signals, and sounds to be transmitted by means of wire communication in interstate commerce, that is, a telephone call between CARL J. PASQUANTINO in Niagara Falls, New York, and telephone number 301-829-2210, located at BJ's Liquors in Mt. Airy, Maryland.

Title 18 U.S.C. §§ 1343 and 2.

COUNT SIX

And the Grand Jury for the District of Maryland further charges that:

1. Paragraphs One through Twelve of Count One of this Indictment are realleged and incorporated by reference as though fully set forth herein.

2. On or about October 16 1999 the State and District of Maryland and elsewhere, the defendants

DAVID B. PASQUANTINO
CARL J. PASQUANTINO
TERRY FRASER
FRANCIS A. GILLOTTI
GERARD T. CICCONE
COSMO D. CANDIDO
and
ARTHUR HILTS a/k/a BUTCH

knowingly and willfully executed and attempted to execute the scheme to defraud, in that they caused signs, signals, and sounds to be transmitted by means of wire communication in interstate commerce, that is, a telephone call between CARL J. PASQUANTINO in Niagara Falls, New York, and telephone number 301-829-2210, located in BJ's Liquors in Mt. Airy, Maryland.

Title 1° U.S.C. §§ 1343 and 2.

COUNT SEVEN

And the Grand Jury for the District of Maryland further charges that:

1. Paragraphs One through Twelve of Count One of this Indictment are realleged and incorporated by reference as though fully set forth herein.

2. On or about August 26, 1998, in the State and District of Maryland and elsewhere, the defendant

GERARD T. CICCONE

did transport in interstate commerce. a firearm and ammunition to wit: a Winchester Model 1300 Defender 12 gauge shotgun and eight 12 gauge shotgun rounds, with the intent to commit an offense punishable by imprisonment for a term exceeding one year and with reasonable cause to believe that such an offense was to be committed, that is wire fraud and aiding and abetting, as is more fully set forth in the preceding counts of this Indictment. Title 18 U.S.C. § 924(b)

/s/ Lynne A. Battaglia
Lynne A. Battaglia
United States Attorney

A TRUE BILL:
/s/ Michelle Shiemczel
Foreperson

Supreme Court, U.S.
FILED
FEB 27 2004
OFFICE OF THE CLERK

(3)

No. 03-725

In the Supreme Court of the United States

DAVID B. PASQUANTINO, CARL J. PASQUANTINO, AND ARTHUR HILTS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record

CHRISTOPHER A. WRAY
Assistant Attorney General

KIRBY A. HELLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

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QUESTION PRESENTED

Whether the wire fraud statute, 18 U.S.C. 1343, prohibits schemes to use the interstate wires in the United States to defraud a foreign government of tax revenue.

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DAVID B. PASQUANTINO, CARL J. PASQUANTINO, AND ARTHUR HILTS, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-37a) is reported at 336 F.3d 321. The opinion of the panel (Pet. App. 38a-53a) is reported at 305 F.3d 291.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2003. On September 29, 2003, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including November 15, 2003, and the petition was filed on November 14, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioners David and Carl Pasquantino were convicted of six counts of wire fraud and petitioner Hilts was convicted of one count of wire fraud, all in violation of 18 U.S.C. 1343. Petitioners David and Carl Pasquantino were sentenced to 97 months of imprisonment, to be followed by two years of supervised release, and petitioner Hilts was sentenced to 21 months of imprisonment, to be followed by two years of supervised release. A panel of the court of appeals reversed petitioners' convictions. Pet. App. 39a-53a. The en banc court of appeals vacated the panel decision and affirmed petitioners' convictions and petitioner Hilts's sentence. *Id.* at 1a-37a.

1. After the Canadian government increased taxes on liquor, a lucrative "black market" developed for liquor smuggled into Canada from the United States. To take advantage of that black market, petitioners smuggled large quantities of liquor into Canada from Maryland. By doing so, they defrauded Canada and the Province of Ontario of excise duties and tax revenues owed on the importation and sale of the liquor in Canada. Pet. App. 2a.

Petitioners' scheme worked as follows : First, while in Niagara Falls, New York, petitioners David and Carl Pasquantino placed orders for the liquor over the telephone to discount liquors stores in Maryland; second, petitioner Hilts and others picked up the orders in rental trucks and drove the shipments to New York for storage; and third, a driver smuggled a quantity of the liquor across the Canadian border in the trunk of a vehicle. Pet. App. 2a-3a. Petitioner David Pasquantino

instructed his smugglers to disregard Canadian customs officials if they ordered the drivers to stop for a secondary inspection. Gov't C.A. Br. 3-4, 6-7.

The indictment charged petitioners with "devis[ing] and intend[ing] to devise a scheme and artifice to defraud the governments of Canada and the Province of Ontario of excise duties and tax revenues relating to the importation and sale of liquor." Pet. App. 58a. Each of the wire fraud counts was based on a telephone call between Niagara Falls, New York, and Maryland. *Id.* at 60a-64a. Petitioners filed a pretrial motion to dismiss the indictment on the ground that a scheme to defraud a foreign government of duties and taxes is not cognizable under the wire fraud statute. The district court denied the motion. Gov't C.A. Br. 2-3.

At trial, a Canadian customs intelligence officer testified about the various taxes that apply to liquor imported from the United States into Canada. She explained that the Canadian and provincial taxes on a case of liquor purchased in Maryland for approximately $56 and then imported into Canada would be approximately $100 per case. In general, the amount of Canadian tax due was twice the purchase price of the liquor in the United States. Pet. App. 4a; Gov't C.A. Br. 4-7.

The jury found petitioners Carl and David Pasquantino guilty on all six counts of the indictment. The district court dismissed counts two through six against petitioner Hilts before it submitted the case to the jury, and the jury found him guilty on the remaining count. Pet. App. 4a-5a.

2. A divided panel of the court of appeals reversed petitioners' convictions. Pet. App. 38a-53a. The panel first held that Canada's right to collect taxes is a property right for purposes of the wire fraud statutes. *Id.* at 43a-44a. It then held, however, that the common-

law revenue rule barred the prosecution in this case. *Id.* at 44a.

The court of appeals granted the government's motion for rehearing en banc, and the en banc court then affirmed petitioners' convictions. Pet. App. 1a-37a. The court first held that since the wire fraud statute, on its face, reaches schemes to defraud a foreign government of tax revenue, such conduct could only fall outside that statute if there were, at the time of the statute's enactment, a well established common law rule prohibiting the courts of one sovereign from recognizing the existence of the revenue laws of a foreign sovereign. *Id.*, at 6a. Based on the Restatement (Third) of Foreign Relations Law of the United States (1987), the court held that there was no such well established rule. Instead, the court held that the common law revenue rule is that "courts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states." Pet. App. 6a (quoting Restatement (Third) § 483). The court emphasized that the common law rule is "permissive" rather than "mandatory," and "it pertains to the nonenforcement of foreign tax judgments as opposed to the nonrecognition of foreign revenue laws." *Id.* at 11a.

The court also rejected petitioners' argument that affirming their convictions would be the functional equivalent of enforcing the revenue rules of Canada and the Province of Ontario. Pet. App. 12a-13a. The court explained that a prosecution under the federal wire fraud statute does nothing to enforce any tax judgment or claim of a foreign sovereign. *Id.* at 13a. Instead, "such prosecution seeks only to enforce the federal wire fraud statute for the singular goal of vindicating our government's substantial interest in preventing our

nation's interstate wire communication systems from being used in furtherance of criminal fraudulent enterprises." *Ibid.* The court also concluded that petitioners' convictions do not raise separation-of-powers concerns since "Congress enacted the wire fraud statute and the United States Attorney, acting on behalf of the United States as directed by the Executive Branch, made the decision to seek the [petitioners'] indictment thereunder." *Id.* at 14a.

Like the panel, the en banc court rejected petitioners' contention that a foreign government's right to tax revenue is not a property right for purposes of the wire fraud statute. The court explained that "because a government has a property right in tax revenues when they accrue, * * * the tax revenues owed Canada and the Province of Ontario by reason of the [petitioners'] conduct in the present case constitute property for purposes of the wire fraud statute." Pet. App. 16a.

Judge Gregory, joined by Judge Michaels, dissented. Pet. App. 27a-37a. The dissent concluded that the revenue rule not only bars enforcement of a foreign government's revenue laws, but also any recognition of such laws. *Id.* at 32a-33a.

ARGUMENT

1. Petitioners contend that, in light of the common law revenue rule, the United States may not bring a wire fraud prosecution against persons who use the wires in this country to defraud a foreign government of tax revenue. That contention is without merit and does not warrant review.

The text of the wire fraud statute applies to "*any* scheme or artifice to defraud * * * by means of wire, radio or television communication in interstate or foreign commerce." 18 U.S.C. 1343 (emphasis added).

It contains no exception based on the identity of the victim of the fraud or the nature of the property that is the object of the fraud. Consistent with the terms of the wire fraud statute, courts have held that the wire fraud statute applies to schemes to defraud foreign governments, foreign corporations, and foreign individuals. See, *e.g.*, *United States* v. *Sensi*, 879 F.2d 888 (D.C. Cir. 1989) (foreign corporation owned by foreign government); *United States* v. *Van Cauwenberghe*, 827 F.2d 424 (9th Cir. 1987) (foreign individual and foreign corporation), cert. denied, 484 U.S. 1042 (1988); *United States* v. *Gilboe*, 684 F.2d 235, 237-238 (2d Cir. 1982) (foreign government), cert. denied, 459 U.S. 1201 (1983). The courts have also upheld mail and wire fraud convictions of defendants who were found to have engaged in schemes to defraud the federal government or a State of tax revenue. See, *e.g.*, *United States* v. *Goulding*, 26 F.3d 656, 663 (7th Cir.) (federal taxes), cert. denied, 513 U.S. 1061 (1994); *United States* v. *Dale*, 991 F.2d 819, 849 (D.C. Cir.) (per curiam) (federal taxes), cert. denied, 510 U.S. 906 (1993); *United States* v. *Helmsley*, 941 F.2d 71, 94 (2d Cir. 1991) (state taxes), cert. denied, 502 U.S. 1091 (1992); *United States* v. *Melvin*, 544 F.2d 767 (5th Cir.) (state taxes), cert. denied, 430 U.S. 910 (1977); *United States* v. *Brewer*, 528 F.2d 492 (4th Cir. 1975) (state taxes). Thus, by its terms, the wire fraud statute applies to schemes to defraud foreign governments of tax revenue.

Congress legislates against the backdrop of well established common law rules. Accordingly, if there were a well established common law rule barring the United States from bringing a criminal prosecution against persons who commit fraud in this country simply because the defrauded party is a foreign government and the property that is the object of the fraud is

tax revenue, the wire fraud statute might be construed to incorporate that common law rule. See *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991) (Congress legislates with an expectation that well established common law rules will apply unless a statutory purpose to the contrary is evident). In fact, however, at the time the wire fraud statute was enacted, there was no such well established common law rule.

The revenue rule, on which petitioners rely, has a far more limited scope. Under that rule, the courts of one sovereign will not enforce the tax judgments or unadjudicated tax claims of another sovereign. See, *e.g.* *QRS 1 Aps* v. *Frandsen*, [1999] 3 All E.R. 289 (C.A. 1999); *Her Majesty the Queen in Right of the Province of British Columbia* v. *Gilbertson*, 597 F.2d 1161 (9th Cir. 1979); *Banco Do Brasil, S.A.* v. *A.C. Israel Commodity Co.*, 190 N.E.2d 235 (N.Y. 1963), cert. denied, 376 U.S. 906 (1964); *United States* v. *Harden*, [1963] S.C.R. 366 (Sup. Ct. Can.); *Peter Buchanan Ltd.* v. *McVey*, [1955] A.C. 516 (Ir. H. Ct. 1950), aff'd, [1955] A.C. 530 (Ir. S. C. 1951). That rule is not implicated when the United States brings a criminal prosecution to enforce the wire fraud statute. As the Fourth Circuit explained, in such a prosecution, the United States does not seek to collect tax revenue for the foreign government. Pet. App. 13a. Instead, it acts to vindicate the United States' sovereign interest in preventing persons from using the wires in this country to commit fraud. *Id.* at 13a-14a.

Nor does a wire fraud prosecution implicate the separation-of-powers considerations that underlie the revenue rule—that courts are ill-equipped to decide when foreign governments should be permitted to enforce their revenue laws in this country and that such judgments are more appropriately made by the legis-

lative and executive branches of the government. As the Fourth Circuit explained, a federal wire fraud prosecution is brought by the Executive Branch pursuant to legislative authorization, and a prosecution will be brought only when the Executive Branch decides that it is in the interest of the United States to do so. Pet. App. 14a. The court of appeals therefore correctly held that the revenue rule did not bar the criminal prosecution in this case.

2. Only two other circuits have addressed the question presented in this case. Consistent with the decision in this case, the Second Circuit held in *United States* v. *Trapilo*, 130 F.3d 547 (1997), cert. denied, 525 U.S. 812 (1998), that the wire fraud statute "reaches *any* scheme to defraud * * * whether the scheme seeks to undermine a sovereign's right to impose taxes or involves foreign victims and governments." *Id.* at 552. The court squarely rejected the view that the common law revenue rule precludes such a prosecution. *Id.* at 552-553. In contrast, the First Circuit held in *United States* v. *Boots*, 80 F.3d 580, cert. denied, 519 U.S. 905 (1996), that the revenue rule bars a criminal prosecution for wire fraud when the object of the fraudulent scheme is to deprive a foreign government of tax revenue.

The First Circuit's conflicting decision in *Boots* does not provide a basis for granting review in this case for three reasons. First, the decision in *Boots* is clearly incorrect. Other than the decision in that case, there is no support for the view that the common law revenue rule ever barred a country from enforcing its own criminal laws simply because the object of the crime was to deprive a foreign government of tax revenue. Second, the First Circuit decided *Boots* before the Second Circuit reached a different conclusion in *Trapilo*

and the Fourth Circuit reached a different conclusion in this case. It is entirely possible that, if presented with the question again, the First Circuit would be prepared to reevaluate *Boots* in light of those two decisions. Third, the question presented has arisen infrequently. It does not have sufficient recurring importance at this time to warrant this Court's review.

3. The other decisions cited by petitioners do not conflict with the decision below and therefore provide no basis for review. In *United States* v. *Pierce*, 224 F.3d 158 (2000), the Second Circuit affirmed its prior holding in *Trapilo* that the government may prosecute a scheme to deprive a foreign government of tax revenue without implicating the revenue rule. It reversed the convictions in *Pierce* solely on the factual ground that the government had not sufficiently proved that Canada imposed any duty on imported liquor. *Id.* at 165-168.

The other two decisions cited by petitioners address the entirely different question whether a foreign government may bring a civil action to recover lost tax revenue when the claim is based in part on a United States law. In *Attorney General of Canada* v. *R. J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103 (2d Cir. 2001), cert. denied, 537 U.S. 1000 (2002), the Attorney General of Canada filed suit against several tobacco companies for engaging in a scheme to smuggle cigarettes across the United States-Canadian border in order to avoid the payment of Canadian taxes, in violation of the Racketeer Influenced and Corrupt Organizations Act (RICO), 18 U.S.C. 1961 *et seq.* The court of appeals held that because Canada sought through its RICO claim to have a United States court require the defendants to reimburse Canada for its unpaid taxes, the revenue rule precluded that claim. 268 F.3d at 131.

Nothing in that decision calls into question the Second Circuit's prior holding in *Trapilo* that the revenue rule does not bar a criminal prosecution where the object of the criminal conduct is to deprive a foreign government of tax revenue. To the contrary, the Second Circuit reaffirmed its prior decision in *Trapilo* on the ground that there is a "critical difference" between a civil suit brought by a foreign sovereign and a criminal action brought by the United States. 268 F.3d at 123. The court explained that, because criminal prosecutions are brought to serve the interests of the United States, and are subject to Executive Branch oversight, "the foreign relations interests of the United States may be accommodated throughout the litigation." *Ibid.* "In contrast," the court observed, "a civil RICO case brought to recover tax revenues by a foreign sovereign to further its own interests, may be, but is not necessarily, consistent with the policies and interests of the United States." *Ibid.*

For the same reason, the Eleventh Circuit's decision in *Republic of Honduras* v. *Philip Morris Companies, Inc.*, 341 F.3d 1253 (2003), petition for cert. pending, No. 03-686, has no bearing on the question presented in this case. In that case, foreign sovereigns filed civil RICO actions against tobacco companies seeking the recovery of tax revenues. Adopting the reasoning of *Attorney General of Canada*, the Eleventh Circuit held that the revenue rule barred those suits. 341 F.3d at 1257. Because *Republic of Honduras* addressed only the application of the revenue rule to civil actions by a foreign sovereign, that decision is inapposite here.

Petitioners contend (Pet. 27-28) that the Fourth Circuit in this case necessarily implied that the revenue rule would not bar a civil action by a foreign government under RICO to collect tax revenue, and the

decision therefore conflicts with the Second Circuit's decision in *Attorney General of Canada* and the Eleventh Circuit's decision in *Republic of Honduras*. But the Fourth Circuit addressed only the question before it. It did not address the question whether a foreign government could file suit under RICO in order to collect tax revenue. Petitioners' view on how the Fourth Circuit would rule in a civil case is only speculation. Nor is that speculation well grounded. The Fourth Circuit concluded that the revenue rule did not bar the prosecution in this case because that prosecution "does nothing civilly or criminally to enforce any tax judgements or claims that the foreign sovereign has or may later obtain against the defendant." Pet. App. 13a. That reasoning makes clear that the Fourth Circuit may take a different view of a civil RICO claim brought by the foreign sovereign itself to reclaim its lost revenue.

4. Petitioners' remaining contentions are all without merit. Petitioners err in contending (Pet. 10-11, 14 n.15) that tax revenues are not property for purposes of the wire fraud statutes. As the Fourth Circuit explained, because a government has a property right in tax revenues when they accrue, the tax revenues owed Canada and the Province of Ontario constitute property for purposes of the wire fraud statute. Petitioners' reliance on *Cleveland* v. *United States*, 531 U.S. 12 (2000), to support a contrary conclusion is misplaced. In *Cleveland*, the Court held that the mail fraud statute does not reach fraud in obtaining a video poker license, because the license at issue was not "property" of the State, the victim of the alleged fraud scheme. *Cleveland* has no application here. Indeed, the Court in *Cleveland* specifically distinguished the situation in that case from one where the government alleges that a

defendant has defrauded a government of "money to which the State was entitled." *Id.* at 22. That is precisely the allegation that the United States made here.

Petitioners similarly err in contending (Pet. 21-22) that the existence of the smuggling statute, 18 U.S.C. 546, precludes prosecution under the wire fraud statute. When conduct violates more than one statute, the government may proceed under either. See, *e.g.*, *United States* v. *Oldfield*, 859 F.2d 392, 397-399 (6th Cir. 1988) (it was permissible for government to prosecute defendant for mail fraud rather than misdemeanor offense of odometer tampering); *United States* v. *Edmonson*, 792 F.2d 1492, 1498 (9th Cir.) ("The fact that there are two criminal statutes applying to exactly the same criminal conduct, and one provides a different penalty from the other, does not create 'irreconcilable conflict' to support a claim of implied repeal.") (internal citations omitted)), cert. denied, 479 U.S. 1037 (1986).

Finally, petitioners argue (Pet. 24) that there was insufficient evidence that the liquor imported into Canada and the Province of Ontario was subject to tax at the time of their offense. As the court of appeals explained, however, the government offered sufficient evidence on that issue. Pet. App. 19a. In any event, petitioners' fact-bound challenge to the court of appeals' determination does not warrant review

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

CHRISTOPHER A. WRAY
Assistant Attorney General

KIRBY A. HELLER
Attorney

FEBRUARY 2004

(4)

No. 03-725

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DAVID B. PASQUANTINO,
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ARTHUR HILTS,

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY BRIEF

JENSEN E. BARBER
JENSEN E. BARBER & ASSOCS.
400 – 7th Street, N.W.
Washington, DC 20004
(202) 737-8511
Counsel for Petitioner David B. Pasquantino

LAURA W. BRILL *
CHRISTOPHER NEWMAN
IRELL & MANELLA, LLP
1800 Avenue of the Stars
Los Angeles, CA 90067
(310) 277-1010
Counsel for Petitioner Arthur Hilts

BRUCE R. BRYAN
333 East Onondaga Street
Syracuse, New York 13202
(315) 476-1800
Counsel for Petitioner Carl J. Pasquantino

* Counsel of Record

March 16, 2004

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IN THE

Supreme Court of the United States

No. 03-725

DAVID B. PASQUANTINO,
CARL J. PASQUANTINO &
ARTHUR HILTS,
Petitioners,

v.

UNITED STATES OF AMERICA
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONER'S REPLY BRIEF

I. The Government Fails In Attempting To Dismiss As Unimportant The Issue In This Case.

The government's Brief in Opposition seeks to minimize the importance of both the conflict below and the question presented. The government does not and cannot deny, however, that there is a direct conflict between the First Circuit, which held in *United States v. Boots*, 80 F.3d 580, *cert. denied*, 519 U.S. 905 (1996), that the federal wire fraud statute does not authorize prosecution of schemes to evade payment of taxes to foreign sovereigns, and the decisions of the Second Circuit and the Fourth Circuit, which have upheld such prosecutions. *See United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997); *United States v. Pasquantino*, 336 F.3d 321

(4th Cir. 2003) (en banc). The government's arguments as to why this conflict is unimportant do not withstand scrutiny.

First, the government asserts that *Boots* was wrongly decided, and suggests that if presented with the question again today, the First Circuit might change its ruling in light of the decisions of the Second and Fourth Circuits. Opp. at 8-9. The government points to no statement in any subsequent First Circuit case in the eight years since *Boots* to suggest that the court is considering such a step. That the reasoning of *Boots* cannot be rejected out of hand is illustrated by the fact that the original Fourth Circuit panel in the present case adopted the same reasoning, *see* Pet. at 39a-50a, and the en banc panel that rejected *Boots* did so over a spirited dissent, *see id.* at 27a-37a. The Eleventh Circuit has also adopted the reasoning of *Boots*. *See Republic of Honduras v. Philip Morris Cos. Inc.*, 341 F.3d 1253, 1256 (11th Cir. 2003).

As this Court emphasized in *Cleveland v. United States*, 531 U.S. 12 (2000), properly limited construction of the mail and wire fraud statutes is especially important because of the role that these offenses play in defining the additional federal offenses of racketeering and money laundering. *See* 531 U.S. at 25. The government regards as irrelevant to the question presented cases addressing the impact of the revenue rule in the context of RICO cases that are predicated on mail or wire fraud. *See* Opp. at 10-11. The issue in this case, however, concerns the proper interpretation of the mail and wire fraud statutes, and there is no basis for interpreting these statutes differently when they serve as predicate offenses for a RICO claim than when they are enforced directly through criminal prosecution. *See Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 138-40 (2d Cir. 2001) (Calabresi, J., dissenting). Cases addressing the application of the revenue rule to RICO claims are therefore very much part of the conflict of authority below, and are part of the doctrinal disarray that this Court should resolve.

Finally, the government asserts that the question presented lacks "sufficient recurring importance." Opp. at 9. In contrast, the prosecutor made the opposite representation to the Fourth Circuit in this very case, asserting that the wire fraud statute is now "the primary legal tool in the United States" to combat smuggling from the United States into foreign countries. United States' Petition for Rehearing En Banc at 7, *United States v. Pasquantino*, 336 F.3d 321 (4th Cir. 2003) (Nos. 01-4463, 4464, 4465). As the government continues to use this tool, cases relating to the applicability of the revenue rule will continue to arise, and defendants will be imprisoned in the Second and Fourth Circuits on charges that should not be brought.[1] In addition, foreign sovereigns will continue to ask U.S. courts to justify their refusal to allow civil RICO recovery of monies that these same courts have held to constitute wrongfully taken property.[2] Given the thoroughness with which the relevant issues have been vetted by the four appellate courts to have addressed the question presented, *see* Pet. at 11-18, there is nothing to be gained and much to be lost by postponing resolution until a later day.

II. The Government's Position Conflicts With Congressional Enactments Concerning Enforcement Of Foreign Customs And Revenue Laws.

The government's Brief in Opposition fails to recognize Congress's interest in regulating foreign affairs. Each time Congress has enacted legislation addressing the country's

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[1] *Cf.* Deborah Sprenger, Effect Upon Prior Convictions Of *McNally v. United States* Rule That Mail Fraud Statute (18 U.S.C.A. § 1341) Is Directed Solely At Deprivation Of Property Rights, 97 A.L.R. Fed. 797 (2004) (documenting "wave of collateral attacks" unleashed by holding in *McNally v United States*, 483 U.S. 350 (1987), that schemes to defraud someone of intangible rights do not fall within the mail fraud statute).

[2] *See, e.g., European Community v. RJR Nabisco*, 355 F.3d 123 (2d Cir. 2004) (reaffirming view that foreign sovereigns are barred from bringing civil RICO suits to recover tax revenue lost to fraud).

interests in enforcing foreign revenue and customs laws, Congress has taken a measured approach that balances the country's interests in protecting its own citizens and in obtaining cooperation from foreign sovereigns for U.S. law enforcement efforts. *See* Pet. at 18-22 (discussing the Revised Protocol With Respect To Taxes, U.S.-Canada, art. 15, S. Treaty Doc. No. 104-4 ("Protocol") (providing that "no assistance shall be provided" with regard to Canadian revenue claims against persons who are U.S. citizens when the tax liability is incurred), and 18 U.S.C. § 546 (providing that the government may prosecute smuggling of goods into a foreign country only if that country has a reciprocal law, and limiting any sentence to no more than two years imprisonment).

The government fails to address the Protocol at all, suggesting that the government can think of no way to reconcile the prosecutions at issue in this case with the dictates of the Protocol. With regard to section 546, the government asserts that it is free to prosecute violation of foreign customs laws either under the statute directly addressing them or under the wire fraud statute, on the ground that, "[w]hen conduct violates more than one statute, the government may proceed under either." *See* Opp. at 12. In taking this position, the government begs the question. *If* the wire fraud statute were applicable to evasion of foreign tax revenue, then the Executive might indeed be free to proceed under either provision. Here, however, the question is whether the mail and wire fraud statutes *should* be interpreted in a way that renders section 546—which was enacted on the same day as the mail fraud statute[3]—largely superfluous. This Court has long recognized as "familiar law" that "a specific statute controls over a general one without regard to priority of enactment." *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) (citations omitted).

[3] *See* Act of June 25, 1948, c. 645, 62 Stat. 717 (codified as amended at 18 U.S.C. § 546), 763 (codified as amended at 18 U.S.C. § 1341).

Here, the government seeks to avoid the limitations contained in a specific statute by relying on a general one—even though such an interpretation conflicts with the revenue rule.

The government engages in similar question-begging when it asserts that criminal wire fraud prosecutions raise no separation-of-powers issues, because they are brought by the Executive Branch and can therefore be assumed to further the "foreign relations interests of the United States." Opp. at 10. Again, this is true only if Congress has not dictated a contrary policy. Congress, however, has granted no express authorization for the prosecutions at issue in this case, and the government's enforcement efforts conflict with those treaty and statutory provisions in which Congress has embodied its views as to the "foreign relations interests of the United States" in this area. Any presumption that executive acts further the foreign relations interests of the United States is at least called into question when those acts circumvent policies adopted pursuant to the legislature's own constitutional power to regulate foreign affairs. *See* U.S. Constitution, Art. 1, sec. 8 (giving Congress the power to regulate commerce with foreign nations); *id.* at Art. 2, sec. 2 (requiring that treaties be made with consent of Senate).

III. The Government Errs In Asserting That Petitioners' Position Is Meritless.

Much of the government's brief is addressed to the merits of the Fourth Circuit's judgment, rather than whether the question presented is an important one that this Court should resolve. To the extent that the merits are relevant, the government's arguments are not persuasive.

A. Tax Obligations Owed To A Foreign Sovereign Do Not Constitute "Money Or Property" At Common Law.

The government concedes that "Congress legislates against the backdrop of well-established common law rules." Opp. at

6-7. It misstates, however, the nature of the inquiry this principle calls for in the present case. The mail and wire fraud statutes apply only to schemes to defraud someone of "money or property." *See McNally v. United States*, 483 U.S. 350, 360 (1987). These statutes do not provide any specialized definition of the term "property," which is a quintessentially common law concept. The proper question, then, is whether, at the time the mail and wire fraud statutes were enacted, tax obligations owed to foreign sovereigns fell within common law rules defining "property."

The government has effectively conceded the answer to this question as well, by acknowledging that under the revenue rule, "the courts of one sovereign will not enforce the tax judgments or unadjudicated tax claims of another sovereign." Opp. at 7 (citations omitted).[4] This is tantamount to an admission that tax obligations owed to a foreign sovereign are not the same thing as "money or property" under common law. If they were, common law would perforce permit a foreign sovereign to recover the sums owed to it through an action in the courts of this country. *See, e.g.*, *The Sapphire*, 78 U.S. 164, 167 (1870) ("A foreign sovereign . . . who has a demand of a civil nature against any person here, may prosecute it in our courts."); *see also* Restatement Third of the Foreign Relations Law of the United States § 481 ("Except as provided in § 482, a final judgment of a court of a foreign state granting or denying recovery of a sum of money . . . or determining interests in property, is conclusive between the parties, and is entitled to recognition in courts in the United States.").[5] The revenue rule embodies an

[4]The government's formulation of the revenue rule differs significantly from that of the Fourth Circuit, which held that the revenue rule applies only to enforcement of "judgments." Pet. App. 11.

[5]The revenue rule is not one of the exceptions to this principle contained in § 482 of the Restatement, but is contained in a separate section of its own, § 483. This corroborates the view that "judgments for

understanding that the obligation to pay taxes is of a different nature from the common law obligations to restore converted property or to pay contractual debts. While the latter obligations stem from common law principles governing relations between private parties, the former stems from an assertion of foreign sovereign power that may be given domestic force only pursuant to treaty or express legislation.

Indeed, the government in this case has not treated Canada as holding a property interest. Although the Mandatory Victims Restitution Act requires victims of wire fraud to receive restitution,[6] the government recognized that such an award was "not appropriate in this case since the victim is a foreign government and the loss derives from [foreign] tax laws." *See* Govt's Statement of Facts and Applicable Sentencing Factors at 3 (Feb. 16, 2001).

B. Cases Upholding The Use Of The Wire Fraud Statute Against Domestic Tax Fraud Do Not Decide The Question Presented.

The United States cites to a number of recent cases in which federal courts have allowed mail or wire fraud prosecutions against defendants who engaged in schemes to defraud the federal government or a State of tax revenue. Opp. at 6. These cases do not implicate the revenue rule, and do not undermine Petitioners' argument. Obviously, the revenue rule does not apply to federal courts when they recognize and enforce tax obligations imposed by the federal

the collection of taxes . . . rendered by the courts of other states" are not merely a subset of the class of "judgments for money or property," but are rather attempts to enforce political obligations whose nature is different from the common law obligation to render up the wrongfully detained money or property of another.

[6] *See* 18 U.S.C. § 3663A(c)(1)(A)(ii) (mandating restitution for any "offense against property under this title); *United States v. Coriaty*, 300 F.3d 244, 252 (2d Cir. 2002) (restitution mandatory for wire fraud).

government. There was, on the other hand, a period when certain State courts had invoked the revenue rule in refusing to enforce tax judgments from other States. *See, e.g., Colorado v. Harbeck*, 133 N.E. 357 (N.Y. 1921). In *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935), this Court held that the Full Faith and Credit Clause overrides the revenue rule with respect to relations between the States, given that the purpose of this clause was "to alter the status of the several states as independent foreign sovereignties . . . and to make them integral parts of a single nation." 296 U.S. at 276-77. Under these circumstances, "no state can be said to have a legitimate policy against payment of its neighbor's taxes[.]" *Id.* at 277. The policy reasons behind the revenue rule thus have no application in the domestic context. There is no dispute in this case that Petitioners paid all domestic taxes.

C. The United States Misconstrues Petitioners' Reliance On *Cleveland*.

Given that federal and State tax obligations *are* enforceable in federal courts, it is not surprising that some federal courts have assumed such obligations to fall within the definition of "money and property" under the mail and wire fraud statutes. *See* Opp. at 6 (citing cases decided prior to this Court's decision in *Cleveland v. United States*, 531 U.S. 12 (2000). This assumption is likely to face considerable scrutiny in light of *Cleveland*. Petitioners' position, however, does not require a determination of this issue.

Contrary to the government's suggestion, *see* Opp. at 11, Petitioners have not invoked *Cleveland* to suggest that tax obligations are categorically outside the scope of "property" under the mail and wire fraud statutes. Rather, the importance of *Cleveland* is its enunciation and illustration of the following three principles, which bear on the question whether taxes owed to a *foreign sovereign* should be regarded as "property": (1) Only a government's "interests as property

holder" are protected by these statutes, and to qualify as "property," an interest must fall within "the traditional concepts of property" while in the hands of the state. *See Cleveland* at 24-27. (2) In making this determination, a federal court is called upon to examine the legal sources giving rise to the government's interest and the purposes served by it. *See id.* at 20-25. (3) Because of the rule of lenity, and the fact that the mail and wire fraud statutes define the federal crimes of racketeering and money laundering, the scope of "property" in these statutes is to be construed strictly, so as to apply in doubtful cases only where Congress has "spoken in language that is clear and definite." *Id.* at 25 (citation omitted).

As discussed above, the revenue rule's denial to foreign sovereigns of the most basic property right of all—the right to recover one's property when wrongfully withheld—precludes a finding that foreign tax obligations satisfy the first of these three principles. Further, it is largely to avoid the kind of inquiry illustrated by the second principle that the revenue rule excludes foreign tax obligations from enforcement as property rights.[7] Finally, given that Congress showed no evidence of a wish to override the revenue rule in enacting

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[7] *See, e.g., Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929) ("No court ought to undertake an inquiry which it cannot prosecute without determining whether [foreign laws] are consonant with its own notions of what is proper.") (L. Hand, J., concurring). In this case, Petitioners were convicted without any evidence that their conduct violated Canadian law at the relevant time. Nor was there any evidence on the question of whether any potential tax obligation had achieved the status of property under Canadian law. Indeed, Petitioners' convictions were based in part on violation of a *sales* tax, *see* Opp. at 2, 3, not just an importation tax, without any evidence that Petitioners intended that Canadian sales tax not be paid. Pet. App. 54a-56a. This is more than a mere fact-based issue, Opp. at 12, as the Second Circuit held in *United States v. Pierce* that evidence of the relevant tax law allegedly violated is required. 224 F. 3d 158, 166 (2d Cir. 2000).

the wire and mail fraud statutes, the third *Cleveland* principle weighs against interpreting it to do so. Thus, whatever implications *Cleveland* may have for the use of these statutes to combat domestic tax evasion, it argues strongly against allowing their use to prosecute schemes involving non-payment of taxes to foreign sovereigns.

CONCLUSION

For the foregoing reasons, as well as those presented in the Petition and in the amicus brief of the National Association of Criminal Defense Attorneys and National Association of Manufacturers, Petitioners respectfully urge the Court to grant a writ of certiorari.

Respectfully submitted,

JENSEN E. BARBER
JENSEN E. BARBER & ASSOCS.
400 – 7th Street, N.W.
Washington, DC 20004
(202) 737-8511
Counsel for Petitioner
David B. Pasquantino

LAURA W. BRILL *
CHRISTOPHER NEWMAN
IRELL & MANELLA, LLP
1800 Avenue of the Stars
Los Angeles, CA 90067
(310) 277-1010
Counsel for Petitioner
Arthur Hilts

BRUCE R. BRYAN
333 East Onondaga Street
Syracuse, New York 13202
(315) 476-1800
Counsel for Petitioner
Carl J. Pasquantino

* Counsel of Record

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICUS CURIAE IN SUPPORT OF PETITIONER

BRENDAN DOWD
FRANK GOLDMAN
JEREMY MALTBY
MARK TEETER
JAMES WALDEN
O'MELVENY & MYERS, LLP
Citigroup Center
153 East 53rd Street, 54th Floor
New York, New York 10022
(212) 326-2000

JOSHUA DRATEL*
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
Co-Chair, Amicus Committee
1150 18th Street, NW
Suite 950
Washington, D.C. 20036
(212) 732-0707

QUENTIN RIEGEL
NAT'L ASS'N OF MANUFACTURERS
Vice President, Litigation & General Counsel
1331 Pennsylvania Avenue
Washington, D.C. 20004
(202) 637-3000

**Counsel of Record*

Attorneys for Amici Curiae

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 10,000 attorneys, in addition to more than 28,000 affiliate members from every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. In keeping with that stated mission, NACDL is dedicated to the preservation and improvement of our adversary system of justice. NACDL frequently files briefs before this Court in cases implicating its substantial interest in substantive criminal law and the ambit of the mail fraud statute and the definition of "property" thereunder.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and in all 50 states. Members of NAM are subject to increased use of criminal penalties in the regulatory state and to the uncertainty that attends the obligation to comply with laws and regulations of multiple (domestic and foreign) jurisdic-

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[1] Pursuant to Rule 37, letters of consent from the parties have been filed with the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and nobody other than *amicus*, its members, or its counsel contributed monetarily to the brief.

tions whose own construction of those laws is often ambiguous.

SUMMARY OF ARGUMENT

The federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, prohibit only schemes to defraud victims of *property*. Federal prosecutors and courts have sometimes ignored this basic constraint, stretching the statutes to criminalize schemes involving bribery, breach of fiduciary duties, public corruption, and false statements to state and local regulatory authorities. Following years of successful prosecutions, this Court reversed these efforts to expand the mail and wire fraud statutes. *See McNally v. United* States, 483 U.S. 350 (1987); *United States v. Cleveland*, 531 U.S. 12 (2000). In doing so, this Court made clear that the statutes protect only "traditional theories of property" and that ambiguities about the statutes' coverage "should be resolved in favor of lenity." *Cleveland*, 531 U.S. at 24-25 (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)). This Court has refused to sanction such "a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Id.*

Despite this very clear and very recent guidance, in this case and others like it, prosecutors and courts have continued to stretch the mail and wire fraud statutes to protect an alleged property right that was unenforceable under common law and the laws of the states: the right of a foreign government to allegedly accrued but unassessed and uncollected taxes.

As explained in the petition, the federal courts of appeal are sharply divided on the propriety of bringing such prosecutions. For that reason alone, this Court should grant certiorari. *See* Sup. Ct. Rule 10. This case requires this Court's review for a separate reason. Although this Court has repeatedly explained the dangers of interpreting the language of the mail and wire fraud statutes beyond traditional notions

of property, courts and prosecutors continue to do so, thereby dangerously expanding federal criminal jurisdiction. In this case, the expansion is particularly unworkable, and will inevitably lead to complicated disputes about foreign law and conflicts with foreign governments. This Court should therefore grant certiorari to return the mail and wire fraud statutes to their sound moorings in protecting traditional forms of property. This Court should do promptly, to avoid a spate of habeas litigation like the one that followed its decision in *McNally*.

ARGUMENT

I. THE FEDERAL GOVERNMENT'S CAMPAIGN TO ENFORCE AN EXPANSIVE INTERPRETATION OF THE FRAUD STATUTES HAS CAUSED ANOTHER CIRCUIT SPLIT.

Over the past thirty years, federal prosecutors have repeatedly sought to expand the reach of the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, to criminalize conduct not covered by the language of these statutes, sometimes to the consternation of federal judges. *See United States v. Evans*, 844 F.2d 36, 41 (2d Cir. 1988) ("We are particularly loathe to expand the wire and mail fraud statutes further, since we have already 'tolerated an extraordinary expansion' of these laws") (quoting *United States v. Weiss*, 752 F.2d 777, 791 (2d Cir. 1985) (Newman, J., dissenting)); *United States v. Siegel*, 717 F.2d 9, 24 (2d Cir. 1983) ("If judges perceive a need for a catch-all federal common law crime, the issue should be addressed explicitly with some recognition of the dangers, rather than continue an inexorable expansion of the mail and wire fraud statutes under the pretense of merely discharging Congress' will") (Winter, J., concurring in part and dissenting in part).

In spite of the current controversy, certain limits on fraud prosecutions are, by now, well-established. This Court has

repeatedly made clear that Congress intended the mail and wire fraud statutes to protect "property rights." *McNally v. United States*, 483 U.S. 350, 356 (1987) (mail fraud); *Carpenter v. United States*, 484 U.S. 19, 28 (1987) (wire fraud). As this Court explained more than a century ago, Congress enacted the mail fraud statute "with the purpose of *protecting the public* against all such intentional efforts to despoil, and prevent the post office from being used to carry them into effect...." *Durland v. United States*, 161 U.S. 306, 314 (1896) (emphasis added). This interpretation is consistent with the views of one of the sponsors of the mail fraud statute, who described the purposes of the bill in the 41st Congress: "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing *the innocent people in the country*." *See McNally*, 483 U.S. at 356 (quoting Cong. Globe, 41st Cong., 3d Sess., 35 (1870) (remarks of Rep. Farnsworth)) (emphasis added). Representative Farnsworth was clearly concerned exclusively with protecting the property of persons within the United States, as opposed to enforcing the tax revenue of foreign governments, when he described the frauds giving rise to the Committee's revised bill: "[t]hus *all through the country* thousands of innocent and unsophisticated people, knowing nothing about the ways of these city thieves and robbers, are continually fleeced and robbed, and the mails are made use of for the purpose of aiding them in their nefarious designs." Cong. Globe, 41st Cong., 3d Sess., 35 (emphasis added).

Despite the clarity of the statutory language and purpose, the government has been able to mount two efforts, each ultimately rejected by this Court, to expand the definition of "property" to encompass rights and interests not protected by the statutes. In the first, the government used the fraud statutes to obtain numerous convictions for fraudulent schemes designed not to take tangible property, but rather to deprive victims of "honest services" to which they were entitled by

law or some fiduciary relationship.[2] In the second, the government used the fraud statutes to obtain numerous convictions of individuals who had used misrepresentations or otherwise dishonest means to obtain licenses from state or local governments and their agencies.[3] With each of these efforts, this Court granted certiorari and ultimately ruled that the

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[2] *See, e.g., United States v. Bruno*, 809 F.2d 1097, 1106 (5th Cir. 1987) (fraud related to honest services of a judge); *United States v. Lovett*, 811 F.2d 979, 986 (7th Cir. 1987) (fraud related to honest services of a mayor); *United States v. Price*, 788 F.2d 234, 237 (4th Cir. 1986) (fraud related to honest services of union management); *United States v. Qaoud*, 777 F.2d 1105, 1113 (6th Cir. 1985) (fraud related to honest services of a judge); *United States v. Murphy*, 768 F.2d 1518, 1530 (7th Cir. 1985) (fraud related to honest services of a judge); *United States v. Alexander*, 741 F.2d 962, 964-65 (7th Cir. 1984) (fraud related to honest services of tax assessors); *United States v. Venneri*, 736 F.2d 995, 997 (4th Cir. 1984) (fraud related to honest services of an employee); *United States v. Clapps*, 732 F.2d 1148, 1153 (3d Cir. 1984) (fraud related to state elections); *United States v. McManigal*, 708 F.2d 276, 283 (7th Cir. 1983) (fraud related to honest services of tax assessors); *United States v. Buckley*, 689 F.2d 893, 901 (9th Cir. 1982) (fraud related to lobbying services); *United States v. Bronston*, 658 F.2d 920, 927 (2d Cir. 1981) (fraud related to an attorney's loyalty); *United States v. Goss*, 650 F.2d 1336, 1346 (5th Cir. 1981) (fraud related to honest services of an agent or employee); *United States v. Bohonus*, 628 F.2d 1167, 1172 (9th Cir. 1980) (fraud related to honest services of an agent or employee); *United States v. Isaacs*, 493 F.2d 1124, 1150 (7th Cir. 1974) (related to honest services of a public official).

[3] *See, e.g., United States v. Shotts*, 145 F.3d 1289, 1297 (11th Cir. 1998) (bail bond licenses); *United States v. Salvatore*, 110 F.3d 1131, 1140 (5th Cir. 1997) (video poker licenses); *United States v. Bucuvalas*, 970 F.2d 937, 945 (1st Cir. 1992) (liquor license); *United States v. Schwartz*, 924 F.2d 410, 419 (2d Cir. 1991) (export licenses); *United States v. Granberry*, 908 F.2d 278, 280-81 (8th Cir. 1990) (school bus driver permits); *United States v. Martinez*, 905 F.2d 709, 716 (3d Cir. 1990) (medical licenses); *United States v. Kato*, 878 F.2d 267, 269 (9th Cir. 1989) (private pilot licenses); *Toulabi v. United States*, 875 F.2d 122, 126 (7th Cir. 1989) (taxi operator licenses); *United States v. Dadanian*, 856 F.2d 1391, 1392 (9th Cir. 1988) (gambling licenses); *United States v. Murphy*, 836 F.2d 248, 254 (6th Cir. 1988) (licenses to conduct bingo games).

government, and many courts, had gone too far because they had strayed from the purpose of the statute, thereby extending the federal government into areas typically left to the states. *See McNally*, 483 U.S. at 361 (mail fraud statute does not criminalize fraudulent scheme to deprive "honest services"); *Cleveland*, 531 U.S. at 24 (mail fraud statute does not criminalize fraudulent scheme to secure state-issued licenses).

In limiting the scope of "property" in *McNally*, this Court emphasized that "[t]here are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." 483 U.S. at 360 (quoting *Fasulo v. United States*, 272 U.S. 620, 629 (1926)). Refusing to read the statute in a way that "leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," this Court made clear that § 1341 is "limited in scope to the protection of property rights." *Id.* In short, without "clear and definite language" from Congress, this Court declined to select a "harsher" reading of a criminal statute that expanded federal criminal law. *Id.*

In *Cleveland*, this Court reiterated and expanded the same message, providing lower courts with a detailed methodology for interpreting "property" in the mail and wire fraud statutes. Relying on the legislative history discussed above, *see supra* at 4-7, this Court rejected "the Government's theories of property rights which stray from traditional concepts of property." 531 U.S. at 24. There, the government argued that Louisiana's interest in regulating video poker licenses was a "property right," in part, because of the stream of income derived from the licensing scheme. The Court ruled that such an expectation of income was not adequate to create a property interest and that Louisiana's exercise of its licensing authority was a "paradigmatic exercise[] of the State's traditional police powers." *Id.* at 23.

Similarly here, Canada's interest in collecting its excise tax "surely implicates [its] role as a sovereign, not as property holder." *Id.* at 24.

In short, this Court explained that the "property" protected by these statutes must be understood in terms of "traditional theories of property" and that any ambiguity in its meaning "should be resolved in favor of lenity." 531 U.S. at 25. This Court also made clear that it will not "approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Id.* at 24. Finally, the Court made clear that the only schemes prohibited by the mail and wire fraud statutes are those that aim to take "property" that is "in the hands" of the victim. *Id.* at 15. Thus, according to this Court's clear direction, before allowing a prosecution under the mail and wire fraud statutes, courts must assure themselves that the alleged scheme seeks to take away clearly defined "property" that is already in the hands of the victim, and that Congress gave clear indication of its intent to criminalize the conduct.

Despite this recent history and clear guidance, the government has persisted in advancing aggressive readings of the fraud statutes that remain untethered to traditional views of the "property" that those statutes were designed to protect. In this case and others like it, the government now seeks to impose punishment for fraud related to "property rights" allegedly created by operation of foreign revenue laws. As explained in the petition, this effort has resulted in an acknowledged split and considerable confusion among the federal courts of appeals. (*See* Pet. 11-18). No court or litigant to address the issues presented by this petition has cited a single case – or any other authority – to support the proposition that Congress intended §§ 1341 and 1343 to protect property interests allegedly belonging to foreign governments under foreign law. For these reasons, the Court should grant certiorari to review the use of the fraud statutes

for offenses outside Congress' stated intent, thereby ensuring adherence to the teachings of *McNally* and *Cleveland* and also resolving the deepening circuit split.

II. UNCOLLECTED FOREIGN TAX REVENUE IS NOT "PROPERTY" WITHIN THE MEANING OF THE FRAUD STATUTES.

The government's case below rested on the theory that alleged efforts to avoid payment of taxes purportedly due under Canadian law – though not assessed, adjudicated, or otherwise reduced to enforceable form by any Canadian governmental authority – amounted to a scheme to deprive the Canadian government of "property," in violation of the wire fraud statues. For several reasons, this theory is entirely inconsistent with this Court's guidance in *McNally* and *Cleveland*.

A. Canada's Interest in Unassessed and Uncollected Taxes is Not a Property Right Under State or Common Law.

First, the victim of the alleged scheme – the Canadian government – never had any "traditional" form of property in its hands. No Canadian authority had any judgment against the defendants or any other party. Nor did it hold any money or property in its coffers that the defendants caused it to part with as a result of fraudulent devices. At most, the Canadian government had a theoretical right to assess a tax and enforce a payment, but it never exercised that right. More important, even if there were a right to payment under Canadian law, the well-established common law revenue rule would still have barred the Canadian government from protecting that right in the courts of the United States.

The Fourth Circuit's analysis fundamentally fails to recognize the absence of a foreign government's cognizable "property right" in revenue under the common law revenue rule. While the Fourth Circuit doubted that the rule was anything more than a permissive doctrine, its analysis of the history and development of the rule conflicts with even the application recognized by courts in Canada,[4] the alleged victim of the Petitioners' prosecution:

> It is a rule of the common law in force in the province of Alberta that: "The Court has no jurisdiction to entertain an action (1) for the enforcement, either directly or indirectly, of a penal, revenue or other public law of a foreign state:" *Dicey and Morris, Conflict of Laws*, 8th ed., R. 21, P. 160. The basis for this rule was contained in the words uttered by way of dictum by Lord Mansfield in *Holman v. Johnson* (1775), 1 Cowp 341, at 343, 98 ER 1120, as follows: ". . . no country ever takes notice of the revenue laws of another." This judicial doctrine has been followed vigorously in decisions of the highest courts of England and it has now

[4] Although not recognized by the Fourth Circuit, various foreign jurisdictions view the common law revenue rule as a well-established principle of international law. *See e.g.*: **Canada**:, *In re Dwelle Estate*, [1969] 69 W.W.R. 212; **Hong Kong**: *In re Anson Garment Ltd.*, [2003] HKEC 683 ("The general rule at common law is revenue laws of a foreign country are not enforced by the local courts."); **Ireland**: *Byrne v. Conroy*, [1999] 2 C.M.L.R. 617, 618 ("The courts of Ireland would not enforce the revenue claims of another country."); **New Zealand**: *Attorney General v. Wellington Newspapers Ltd.*, [1989] 2 F.S.R. 691, 713 ("It is a well settled principle of private international law that: 'English courts have no jurisdiction to entertain an action--(1) [f]or the enforcement, either directly or indirectly, of a ...revenue ...law of a foreign state....This principle applies equally to New Zealand courts."); **Scotland**: *Scottish National Orchestra Soc'y Ltd. v. Thomson's Ex'r*, [1969] S.L.T. 325, 328 ("Foreign Revenue laws are not enforceable in the Scottish courts."); **United Kingdom**: *Qrs 1 Aps v. Frandsen*, [2000] I.L.Pr. 8 ("It is a fundamental principle of English law that our courts will not directly or indirectly enforce the penal, revenue or other public laws of another country.").

> been established that same is in full force and effect in Canada.

In re Dwelle Estate, [1969] 69 W.W.R. 212.[5]

Courts – even those that have reversed convictions like Petitioners' – have consistently misapprehended the significance of the revenue rule in the context of the fraud statutes. While some have held the rule to be a permissive doctrine, allowing courts to refrain from giving effect to foreign revenue laws, *see United States v. Pasquantino*, 336 F.3d 321, 340-41 (4th Cir. 2003) (en banc); *European Community v. RJR Nabisco, Inc.*, 150 F. Supp. 2d 456, 483 (E.D.N.Y. 2001), and others describe the rule as jurisdictional because, under this view, courts may not give effect to foreign revenue laws, *see United States v. Boots*, 80 F.3d 580, 588 (1st Cir. 1996), the distinction is irrelevant for purposes of the fraud statutes. The importance of the common law revenue rule is not only whether the rule, of its own force, precludes a prosecution,[6] but also the extent to which the rule evi-

[5] It is not surprising, then, that research has revealed no case in which Canada prosecuted an individual for allegedly defrauding the U.S. government of tax revenue. Indeed, the absence of any reciprocal offense under Canadian law to punish those who smuggle goods into the United States would have precluded Petitioners' conviction under the applicable U.S. smuggling statute, 18 U.S.C. § 546. *See United States v. Miller*, 26 F. Supp. 2d 415, 426 (N.D.N.Y. 1998) (Canada lacks outbound smuggling that that could satisfy the reciprocity requirement of § 546).

[6] Indeed, the Court below misapprehended this point with its focus on whether the Petitioners' criminal conviction was tantamount to enforcement of Canada's revenue law. It should be noted, however, that the Fourth Circuit's reasoning even on this point was flawed. The penalties required after such a conviction include a term of incarceration that is based on the application of the foreign law giving rise to the alleged tax, as well as a mandatory restitution award that, inescapably, must be based on the amount of taxes owed. *See infra* at n. 8 (and accompanying text) (discussing mandatory restitution pursuant to 18 U.S.C. § 3663A(c)(1)).

dences the absence of a cognizable "property right" under common law and the laws of the states.

All courts agree that the doctrine, whether permissive or mandatory, is firmly embedded in the common law and any court can invoke it to prevent a foreign sovereign from seeking to enforce its revenue laws within its jurisdiction. The doctrine was, in fact, "so well recognized" that it was not until the 1970's – well after passage of both the mail and wire fraud statutes – that a foreign government sued in an American court to enforce a foreign tax judgment. *See Her Majesty v. Gilbertson*, 597 F.2d 1161, 1164 (9th Cir. 1979). Even in that case, the court refused to enforce the judgment, saying that the revenue rule "has been with us for centuries and as such has become firmly embedded in the law." *Id.* at 1166. Research has found no case in which a court ever enforced a foreign government's tax judgment in an American court, a fact that numerous commentators have recognized and some have bemoaned. *See generally*, Robert A. LeFlar, Extrastate *Enforcement of Penal and Governmental Claims*, 46 Harv. L. Rev. 193 (1932); *Extraterritorial Collection of State Inheritance Taxes*, 29 Col. L. Rev. 782 (1929); Charles F. Midkiff, Note, *Extraterritorial Enforcement of Tax Claims*, 12 Wm. & Mary L. Rev. 111 (1970); Adrian Briggs, *The Revenue Rule in the Conflict of Laws: Time for a Makeover*, 2001 Sing. J. Legal Stud. 280 (2001); Nathaniel L. Goldstein, *Interstate Enforcement of Tax Laws of Sister States*, 30 Taxes 247 (1952).

In light of the fact that no court has ever enforced a foreign government's "right" to collect revenue in an American courtroom, the inescapable conclusion is that such a "property right" does not exist at common law or under the laws of the states. *See Ruckelhaus v. Monsanto*, 467 U.S. 986, 1001 (1984) ("'[p]roperty interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law'") (quot-

ing *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972))); *Borre v. United States*, 940 F.2d 215, 220 (7th Cir. 1991) ("It is logical, therefore, for this court to look to state law [to define property] for the purposes of the mail fraud statute"). Simply put, a person can depart from a foreign jurisdiction with proceeds to which the foreign government claims a right under its revenue laws, and American courts will not enforce the sovereign's right to collect the money. *See Gilbertson*, 597 F.2d at 1162-63. This rule was so well established at the time that Congress passed the mail and wire fraud statutes that states often would refuse to enforce tax judgments obtained by sister states. *See, e.g., State of Colorado v. Harbeck*, 133 N.E. 357 (N.Y. 1921); *Moore v. Mitchell*, 30 F.2d 600, 602-03 (2d Cir. 1929). While this latter trend has sensibly given way to the Constitution's "full faith and credit clause," *Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 272-77 (1935), no American court has directed the surrender of money or property from an individual to a foreign government on account of revenues owed.[7]

[7] Although the revenue rule yielded to the Constitution's "full faith and credit clause" some time ago, the barrier to enforcing the collection of taxes owed to a foreign sovereign remains well rooted in common law precedent. The distinction between sister states and foreign sovereigns is clear and arises out of our dual system of government:

> The very purpose of the full faith and credit clause was to alter the status of the several states as independent foreign sovereignties, each free to ignore obligations created under the laws or by the judicial proceedings of the others, and to make them integral parts of a single nation....

Milwaukee County v. M. E. White Co., 296 U.S. 268, 277 (1935). The full faith and credit clause, upon which *M.E. White* was decided, clearly does not apply to foreign sovereigns and, hence, U.S. courts have never extended the rule in *M.E. White* to apply to the enforcement of uncollected tax revenue of such foreign sovereigns.

Thus, the lower courts' discussions of whether the revenue rule is permissive or mandatory, and whether the policies that underlie it are valid or antiquated, have little bearing on the viability of this prosecution. The Canadian government had no property or enforceable property right in its hands, and the fact remains that the federal government attempts, with prosecutions such as those against Petitioners, to protect a right in "property" that historically enjoys no protection under common law or the laws of the states, a right beyond "the traditional concepts of property." *See Cleveland*, 531 U.S. at 24. Such attempts cannot survive this Court's prior jurisprudence – or its scrutiny in this case.

Indeed, the government's conduct in this case effectively conceded that the Canadian government did not have a property interest protected by the wire fraud statute. Although the Mandatory Victims Restitution Act requires the court to impose a restitution order following conviction for the instant offense,[8] the government did not seek a restitution order in this case, stating that such an award was "not appropriate in this case since the victim is a foreign government and the loss derives from tax laws of the foreign government." *See* Govt's Statement of Facts and Applicable Sentencing Factors at 3 (Feb. 16, 2001). Thus, the Government conceded that, whatever Canada's interest in uncollected taxes, that interest was insufficient for a restitution award, a

[8] *See* 18 U.S.C. § 3663A(c)(1)(A)(ii) (mandating restitution if the crime is "an offense against property under this title . . . including any offense committed by fraud or deceit"); § 3663A(c)(1)(B) (mandating restitution for crimes "in which an identifiable victim or victims has suffered . . . pecuniary loss"); *see also United States v. Bright*, No. 02-50492, -- F.3d --, 2004 WL 25017, at *5 (9th Cir. Jan. 5, 2004) (18 U.S.C. § 3663A(c)(1)(A)(ii) mandates restitution for mail fraud offenses); *United States v. Vanhorn*, 344 F.3d 729, 730 (8th Cir. 2003) (same); *United States v. Hasson*, 333 F.3d 1264, 1275 (11th Cir. 2003) (mandating restitution for mail and wire fraud pursuant to § 3663A(c)(1)(B)); *United States v. Coriaty*, 300 F.3d 244, 252 (2d Cir. 2002) (restitution mandatory under 18 U.S.C. § 3663A(c)(1)(A)(ii) for wire fraud).

concession fundamentally at odds with its claim that the property interest was within the protection of the wire fraud statute.

B. Application of the Rule of Lenity Requires Reversal of Petitioners' Convictions.

Making this case all the more unusual, the government has essentially argued before this Court that the definition of "property" in the fraud statutes has two meanings – one when it attempts to prosecute individuals for schemes to evade foreign tax laws but a different, more limited definition – one reflecting the common law revenue rule – when foreign governments attempt to collect civil judgments under the RICO statute based on patterns of mail and wire fraud. *See* Brief for the United States as Amicus Curiae at 7, 16, *Attorney General of Canada v. R.J. Reynolds Tobacco Holding, Inc.* (S. Ct. case no. 01-1317) (Oct. 2002). Such a dichotomy turns an established canon of statutory construction, the rule of lenity, on its head.

This "venerable principle," *Moskal v. United States*, 498 U.S. 103, 131 (1990) (Scalia, J., dissenting), requires that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971). This Court has "[i]n various ways over the years . . . stated that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the hasher alternative, to require that Congress should have spoken in language that is clear and definite.'" *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952)). Justice Scalia's dissent in *Moskal* states succinctly what has been an unwavering principle of construction for federal criminal statutes: "[t]he temptation to stretch the law to fit the evil is an ancient one, and it must be resisted." 498 U.S. at 132.

Indeed, both *McNally* and *Cleveland* rely on this rule to constrain the federal government's attempts to expand the scope of the mail fraud statute, including the very definition of "property." *See Cleveland*, 531 U.S. at 25 ("In deciding what is 'property' under § 1341, we think 'it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite'") (quoting *Universal C.I.T. Credit Corp.*, 344 U.S. at 221-22); *McNally*, 483 U.S. at 360 ("Rather than construe the statute in such a manner that leaves its outer boundaries ambiguous . . . we read § 1341 as limited in scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has").

Here, even if one could conclude that there is an open question concerning Congress' intentions,[9] that question must be resolved by applying the rule of lenity, a principle that the Fourth Circuit failed to address in its analysis. Indeed, the *Pasquantino* court, and for that matter the *Trapilo* court, chose to apply the harsher of two definitions of "property," notwithstanding the dearth of any precedent that Congress intended the harsher alternative. *United States v. Trapilo*, 103 F.3d 547, 552 & n.8 (2d Cir. 1997). Following this Court's directive in *McNally* and *Cleveland*, the Fourth Circuit should have required Congress to "speak more clearly than it has" before the courts may interpret the definition of "property" to encompass a property right that cannot be enforced in an American court under the laws of the states and the common law. *McNally*, 483 U.S. at 360.

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[9] As noted above, *see supra* at 4-7, the legislative history includes no evidence whatsoever that Congress intended to protect the right of a foreign sovereign in accrued but uncollected "sin taxes" under the mail fraud statute; actually the legislative history suggests only that Congress intended to protect the U.S. public from fraudulent schemes.

III. COLLATERAL CONSEQUENCES FAVOR GRANTING CERTIORARI NOW.

For all of the foregoing reasons, the Fourth Circuit's analysis of the mail fraud statute fundamentally conflicts with this Court's guidance in *McNally* and *Cleveland*. Along with the clear conflict among the circuits, this striking departure calls for this Court's prompt review. There are at least three additional reasons for this Court to grant certiorari and decide this question immediately.

First, the Court can promptly clarify the scope of the mail and wire fraud statutes and avoid the kind of wasteful and destructive prosecutions that preceded *McNally*. Granting certiorari now, and resolving this issue before a proliferation of government prosecutions under this novel theory, will eliminate the burden on federal courts of not just prosecutions, but the collateral attacks that will inevitably result should the government's interpretation of the mail and wire fraud statutes be later discredited, as it was in *McNally* and *Cleveland*, long after many people had been convicted and imprisoned.[10]

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[10] *See, e.g., Lomelo v. United States*, 891 F.2d 1512, 1519 (11th Cir. 1990) (affirming denial of relief under 28 U.S.C. § 2255 because although *McNally* applied retroactively, conviction necessarily also involved a finding that the government was deprived of money or property, as well as honest services); *United States v. Walgren*, 885 F.2d 1417, 1424 (9th Cir. 1989) (reversing district court to apply *McNally* retroactively and grant *coram nobis* relief); *Callanan v. United States*, 881 F.2d 229, 234 (6th Cir. 1989) (reversing district court, in part, to apply *McNally* retroactively and vacate mail fraud convictions pursuant to 28 U.S.C. § 2255); *United States v. Marcello*, 876 F.2d 1147 (5th Cir. 1989) (reversing district court to grant petitioners' requests pursuant to 28 U.S.C. § 2255 and petition for writ of error *coram nobis* relief to vacate RICO conviction predicated on violations of mail and wire fraud statutes); *United States v. Mitchell*, 867 F.2d 1232, 1234 (9th Cir. 1989) (reversing district court's denial of relief under 28 U.S.C. § 2255); *United States v. Osser*, 864 F.2d 1056, 1064 (3rd Cir. 1989) (denying *coram nobis* relief because indictment also charged, and evidence was presented

Second, the Fourth Circuit's rule will inevitably lead to complicated and unwieldy prosecutions. In order to establish a scheme to defraud based on failure to pay foreign taxes, the government must necessarily prove that the foreign state had a right to collect taxes under its domestic law, and that the defendant intended to defeat that right. Thus, every case tried under this theory will involve complicated questions of tax law, requiring the development and presentation of expert testimony about the intricacies of civil and criminal foreign law. As the defense bar is not typically versed in the requirements of foreign tax laws or in the possible defenses to charges of foreign tax evasion, prosecutions based upon foreign tax violations will necessarily impose additional expense and delay.

Third, requiring U.S. courts and juries to determine the contours of foreign tax laws is likely to create friction and conflict with foreign governments. A case recently prosecuted under the Lacey Act, 16 U.S.C. § 3372(a)(2)(A), illustrates that this is more than a hypothetical concern. That statute prohibits the importation of "fish or wildlife taken, possessed, transported, or sold in violation of . . . any foreign law." *Id.* In *McNab v. United States*, 331 F.3d 1228 (11th Cir. 2003), petition for cert. pending, No. 03-622, the government obtained a conviction on the theory that the defendants had imported lobsters taken and packaged in ways that violated the laws of Honduras.

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of, a monetary loss); *United States v. Mandel*, 862 F.2d 1067, 1075 (4th Cir. 1988) (affirming grant of *coram nobis* relief); *Magnuson v. United States*, 861 F.2d 166, 169 (7th Cir. 1988) (affirming grant of relief under 28 U.S.C. § 2255); *United States v. Keane*, 852 F.2d 199, 206 (7th Cir. 1988) (affirming denial of *coram nobis* relief); *United States v. Shelton*, 848 F.2d 1485, 1497 (10th Cir. 1988) (applying *McNally* retroactively to vacate mail fraud convictions pursuant to 28 U.S.C. § 2255); *Ingber v. Enzor*, 841 F.2d 450, 456 (2d Cir. 1988) (applying *McNally* retroactively and affirming district court's grant of relief under 28 U.S.C. § 2255).

Incorporating the law of foreign jurisdictions into American criminal statutes increases the likelihood that U.S. courts will create undesirable conflicts between their interpretations of foreign laws and those of the foreign sovereign. *See Boots*, 80 F.3d at 588 ("[t]he longstanding rule instructs the court to leave this area alone…so that a foreign government's revenue laws are not subjected to intrusive scrutiny by the courts of this country"). In *McNab*, for example, the trial and appellate proceedings involved extensive evidence concerning Honduran law and regulations. During those proceedings, the courts received different views from the Honduran government about the applicable rule. In affirming the conviction, the Court of Appeals for the Eleventh Circuit ultimately rejected the views expressed by the Embassy of Honduras during the appeal. Thus, the conviction rested upon a view of Honduran law rejected by at least one branch of the Honduran government, placing our courts at odds with another nation. Undesirable conflicts of this kind are likely to arise under any statute that incorporates foreign law, as U.S. courts would be compelled to scrutinize foreign laws and judgments. This unfortunate reality provides a strong reason not to read foreign law into U.S. penal law unless expressly authorized by Congress.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

BRENDAN DOWD
FRANK GOLDMAN
JEREMY MALTBY
MARK TEETER
JAMES WALDEN
O'MELVENY & MYERS, LLP
Citigroup Center
153 East 53rd Street, 54th Floor
New York, New York 10022
(212) 326-2000

JOSHUA DRATEL
(*Consel of Record*)
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
Co-Chair, Amicus Committee
1150 18th Street, NW
Suite 950
Washington, D.C. 20036
(212) 732-0707

QUENTIN RIEGEL
NAT'L ASS'N OF MANUFACTURERS
Vice President, Litigation & General Counsel
1331 Pennsylvania Avenue
Washington, D.C. 20004
(202) 637-3000

Attorneys for Amicus Curiae

Dated: February 27, 2004

Nos. 03-725

Supreme Court, U.S.
FILED
JUL 29 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DAVID B. PASQUANTINO,
CARL J. PASQUANTINO &
ARTHUR HILTS,
Petitioners,

v.

UNITED STATES OF AMERICA
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

JOINT APPENDIX

THEODORE B. OLSON *
Solicitor General
DEPARTMENT OF JUSTICE
Washington, DC 20530-0001
(202) 514-2217

LAURA W. BRILL *
CHRISTOPHER M. NEWMAN
ALAN J. HEINRICH
KATHERINE KRAUS
PETER SHIMAMOTO
IRELL & MANELLA, LLP
1800 Avenue of the Stars
Los Angeles, California 90067
(310) 277-1010
Counsel for Petitioner Arthur Hilts

* Counsel of Record

* Counsel of Record

June 29, 2004

[*Additional counsel listed on inside cover*]

PETITIONS FOR CERTIORARI FILED NOVEMBER 14, 2003
CERTIORARI GRANTED APRIL 5, 2004

BRUCE R. BRYAN
333 East Onondaga Street
Syracuse, New York 13202
(315) 476-1800

Counsel for Petitioner
Carl J. Pasquantino

JENSEN E. BARBER
JENSEN E. BARBER & ASSOCS.
400 – 7th Street, N.W.
Washington, DC 20004
(202) 737-8511

Counsel for Petitioner
David B. Pasquantino

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Indictment ..... Pet. App. 57a

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

[Filed 6/22/01]

Case No. 01-4465

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

v.

ARTHUR HILTS,
Defendant-Appellant.

DOCKET ENTRIES

DATE	PROCEEDINGS
6/22/01	Criminal case docketed. (ldj) [01-4465]
6/22/01	ORDER FILED appointing Isaac Joe, Jr. as CJA counsel for Appellant Arthur Hilts in 01-4465 [3409273-1]. Nunc Pro Tunc Date: 6/15/01. Copies to all counsel. [01-4465] (ldj) [01-4465]
6/22/01	ORDER FILED appointing Michael J. McCarthy as CJA counsel for Appellant Carl J. Pasquantino in 01-4464 [3409274-1]. Nunc Pro Tunc Date: 6/8/01. Copies to all counsel. [01-4464] (ldj) [01-4464]
6/22/01	ORDER FILED appointing Jensen E. Barber II as CJA counsel for Appellant David B. Pasquantino in 01-4463 [3409276-1]. Nunc Pro Tunc Date: 6/8/01. Copies to all counsel. [01-4463] (ldj) [01-4463]

DATE	PROCEEDINGS
6/22/01	ORDER FILED consolidating case 01-4465 01-4464 with 01-4463 [3409277-1]. Copies to all counsel. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
6/22/01	Docketing notice issued. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
6/22/01	Docketing statement filed by Appellant David B. Pasquantino in 01-4463 [3409715-1] T/S needed [Y/N]: y T/S already on file?: y. [01-4463] (ldj) [01-4463]
6/22/01	Docketing statement filed by Appellant Carl J. Pasquantino in 01-4464 [3409723-1] T/S needed [Y/N]: y T/S already on file?: n. [01-4464] (ldj) [01-4464]
6/22/01	Transcript order filed for Mary M. Zajac in 01-4464. What is being ordered: 6/8/01 sentencing; 9/7/00 motions hearing; 2/6, 2/7, 2/8, 2/12/01 trial testimony . [01-4464, 01-4463, 01-4465] (ldj) [01-4463 01-4464 01-4465]
6/22/01	Transcript order acknowledgment filed. [01-4464, 01-4463, 01-4465] Transcript due on 7/23/01 for Mary M. Zajac in 01-4464, for Mary M. Zajac in 01-4463, for Mary M. Zajac in 01-4465 . T/S certification due on 7/23/01 for Mary M. Zajac in 01-4464, for Mary M. Zajac in 01-4463, for Mary M. Zajac in 01-4465 . (ldj) [01-4463 01-4464 01-4465]
6/22/01	Transcript order filed for Lisa K. Bankins in 01-4464. What is being ordered: 2/13/01 jury instructions; 2/13/01 verdict . [01-4464, 01-4463, 01-4465] (ldj) [01-4463 01-4464 01-4465]

DATE	PROCEEDINGS
6/22/01	Transcript order acknowledgment filed. [01-4464, 01-4463, 01-4465] Transcript due on 7/23/01 for Lisa K. Bankins in 01-4464, for Lisa K. Bankins in 01-4463, for Lisa K. Bankins in 01-4465 . T/S certification due on 7/23/01 for Lisa K. Bankins in 01-4464, for Lisa K. Bankins in 01-4463, for Lisa K. Bankins in 01-4465 . (ldj) [01-4463 01-4464 01-4465]
6/25/01	Docketing statement filed by Appellant Arthur Hilts in 01-4465 [3410577-1] T/S needed [Y/N]: y T/S already on file?: n. [01-4465] (ldj) [01-4465]
6/25/01	Transcript order received from Isaac Joe for Appellant Arthur Hilts in 01-4465 and returned because of more than one court reporter listed (Counsel filed a tpo for Lisa Bankins, but is ordering trial testimony and sentencing. A different court reporter transcribed sentencing) [01-4465] New due date: 7/5/01 for Isaac Joe. (ldj) [01-4465]
6/25/01	Counsel of record form filed by Isaac Joe in 01-4465 for Appellant Arthur Hilts in 01-4465. (ldj) [01-4465]
6/27/01	Counsel of record form filed by Isaac Joe in 01-4465 for Appellant Arthur Hilts in 01-4465. (ldj) [01-4465]
6/29/01	Transcript order filed for Lisa K. Bankins in 01-4463, 01-4464, 01-4465. What is being ordered: 2/13/01. [01-4463, 01-4464, 01-4465] (ta) [01-4463 01-4464 01-4465]

DATE	PROCEEDINGS
6/29/01	Transcript order filed for Mary M. Zajac in 01-4463, 01-4464, 01-4465. What is being ordered: 9/7/00, 2/5/01-2/9/01, 2/12/01, 6/8/01. [01-4463, 01-4464, 01-4465] (ta) [01-4463 01-4464 01-4465]
6/29/01	Transcript order acknowledgment filed. [01-4463, 01-4464, 01-4465] Transcript due on 7/30/01 for Lisa K. Bankins in 01-4463, for Lisa K. Bankins in 01-4464, for Lisa K. Bankins in 01-4465 . T/S certification due on 7/30/01 for Lisa K. Bankins in 01-4463, for Lisa K. Bankins in 01-4464, for Lisa K. Bankins in 01-4465 . (ta) [01-4463 01-4464 01-4465]
6/29/01	Transcript order acknowledgment filed. [01-4463, 01-4464, 01-4465] Transcript due on 7/30/01 for Mary M. Zajac in 01-4463, for Mary M. Zajac in 01-4464, for Mary M. Zajac in 01-4465 . T/S certification due on 7/30/01 for Mary M. Zajac in 01-4463, for Mary M. Zajac in 01-4464, for Mary M. Zajac in 01-4465 . (ta) [01-4463 01-4464 01-4465]
7/3/01	Counsel of record form filed by Gregory Welsh in 01-4463, Gregory Welsh in 01-4464, Gregory Welsh in 01-4465 for Appellee US in 01-4463, Appellee US in 01-4464, Appellee US in 01-4465. (ldj) [01-4463 01-4464 01-4465]
7/12/01	Counsel of record form filed by Jensen Egerton Barber in 01-4463 for Appellant David B. Pasquantino in 01-4463. (ldj) [01-4463]
7/17/01	Counsel of record form filed by Michael Joseph McCarthy in 01-4464 for Appellant Carl J. Pasquantino in 01-4464. (ldj) [01-4464]

DATE	PROCEEDINGS
7/25/01	Certification transcript filed in district court by Mary M. Zajac in 01-4463, Mary M. Zajac in 01-4464, Mary M. Zajac in 01-4465 on 7/18/01. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
8/6/01	Certification transcript filed in district court by Lisa K. Bankins in 01-4463, Lisa K. Bankins in 01-4464, Lisa K. Bankins in 01-4465 on 7/30/01. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
8/6/01	Briefing order filed. [01-4463, 01-4464, 01-4465] Appellant(s) brief/joint appendix due 9/10/01 for David B. Pasquantino in 01-4463, for Carl J. Pasquantino in 01-4464, for Arthur Hilts in 01-4465 . (ldj) [01-4463 01-4464 01-4465]
8/8/01	Certification transcript filed in district court by Mary M. Zajac in 01-4463 on 7/18/01. [01-4463] (ldj) [01-4463]
8/13/01	Certification of ROA complete and retained in the District Court. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
8/31/01	Motion filed by Appellant David B. Pasquantino in 01-4463, Appellant Carl J. Pasquantino in 01-4464, Appellant Arthur Hilts in 01-4465 to extend time to file appellant(s) brief/appendix until 11/9/01 [3448295-1]. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]

DATE	PROCEEDINGS
8/31/01	ORDER FILED granting motion to ext time to file a's br/apx [3448295-1] Appellant(s) brief/ joint appendix now due 10/1/01 for David B. Pasquantino in 01-4463, for Carl J. Pasquantino in 01-4464, for Arthur Hilts in 01-4465 . Conf aty recomm?: n. Number of days granted: 21. in 01-4463, 01-4464, 01-4465 Copies to all counsel. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
10/2/01	Brief and joint appendix filed by Appellant David B. Pasquantino in 01-4463, Appellant Carl J. Pasquantino in 01-4464, Appellant Arthur Hilts in 01-4465. Copies of brief: 6 it brf pages: 35 Sufficient[Y/N]?: Y. . . Copies of apx: 5 # apx pages: 365. 2-sided copying[Y/N]?: Y. Method of filing w/ court: per clerk order Date of Service on parties: 10/2/01 Type of service on parties: pm Appellee brief due 10/26/01 for US in 01-4463, for US in 01-4464, for US in 01-4465 . [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
10/2/01	Motion filed by Appellant David B. Pasquantino in 01-4463, Appellant Carl J. Pasquantino in 01-4464, Appellant Arthur Hilts in 01-4465 for leave to file brief and joint appendix out of time as of 10/2/01 [3467002-1]. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
10/4/01	ORDER FILED granting motion to file br/apx out of time [3467002-1] as of 10/2/01 in 01-4463, 01-4464, 01-4465 Copies to all counsel. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]

DATE	PROCEEDINGS
10/24/01	Brief filed by Appellee US in 01-4463, Appellee US in 01-4464, Appellee US in 01-4465. Copies of brief: 8 # brf pages: 28. Sufficient[Y/N]?: Y. . . Method of filing w/ court: pm Date of Service on parties: 10/24/01 Type of service on parties: pm [01-4463, 01-4464, 01-4465] (ldj) [01-446301-4464 01-4465]
11/2/01	Motion filed by Appellant David B. Pasquantino in 01-4463, Appellant Carl J. Pasquantino in 01-4464, Appellant Arthur Hilts in 01-4465 to extend time to file reply brief until 11/16/01 [3482784-1] [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
11/2/01	ORDER FILED granting motion to ext time to file reply brf [3482784-1] until 11/13/01. Conf aty recomm? (Y/N): n. No. days granted (Enter # only): 7. in 01-4463, 01-4464, 01-4465 Copies to all counsel. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
11/13/01	Reply brief filed by Appellant David B. Pasquantino in 01-4463, Appellant Carl J. Pasquantino in 01-4464, Appellant Arthur Hilts in 01-4465. Copies of brief: 6 # brf pages: 37. Sufficient[Y/N]?: N - need motion for leave to file out of time. Method of filing w/ court: hd Date of Service on parties: 11/13/01 Type of service on parties: pm [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]

DATE	PROCEEDINGS
11/13/01	Motion filed by Appellant David B. Pasquantino in 01-4463, Appellant Carl J. Pasquantino in 01-4464, Appellant Arthur Hilts in 01-4465 to file supplemental appendix [3488406-1] Supplemental appendix tendered? (YIN): Y. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
11/13/01	Certificate filed by Appellant David B. Pasquantino in 01-4463, Appellant Carl J. Pasquantino in 01-4464, Appellant Arthur Hilts in 01-4465 to place volume 2 of the supplemental appendix under seal [3488425-1]. [01-4463, 01-4464, 01-4465] [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
11/14/01	ORDER FILED granting motion to file supplemental appendix [3488406-1] in 01-4463, 01-4464, 01-4465 Copies to all counsel. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
11/14/01	Supplemental appendix filed by Appellant David B. Pasquantino in 01-4463, Appellant Carl J. Pasquantino in 01-4464, Appellant Arthur Hilts in 01-4465. Copies of apx: 5 of vol. 1; 4 of vol. 2 # apx pages: 20. . Sufficient[Y/N]?: Y. . SEALED[Y/N]?: Y - vol. 2 sup apx [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]

DATE	PROCEEDINGS
11/14/01	ORDER FILED granting certificate to place volume 2 of the supp. apx under seal [3488425-1] [01-4463, 01-4464, 01-4465] in 01-4463, 01-4464, 01-4465 Copies to all counsel. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
12/14/01	Case tentatively calendared for oral argument Term: 3/02 Place: Richmond. SUBMISSION DEADLINE: 12/26/01. (jc) [01-2045 01-2049 01-2067 01-2075 01-2092 01-2093 01-2098 01-2100 01-2101 01-2102 01-2109 01-2113 01-2122 01-2141 01-2149 01-2154 01-2161 01-2180 01-2183 01-2227 01-2228 01-4168 01-4169 01-4344 01-4463 01-4464 01-4465 01-4505 01-4513 01-4527]
12/18/01	CJA 21 Voucher received from Lantagne Legal Printing for brief and joint appendix. [01-4463] (pgl) [01-4463]
12/18/01	CJA 21 Voucher received from Lantagne Legal Printing for reply brief and supplemental appendix. [01-4463] (pgl) [01-4463]
12/21/01	Motion filed by Appellant Carl J. Pasquantino in 01-4464, Appellant David B. Pasquantino in 01-4463, Appellant Arthur Hilts in 01-4465 to continue oral argument. [3509019-1]. [01-4464, 01-4463, 01-4465] (ldj) [01-4463 01-4464 01-4465]
12/21/01	Response/answer requested to motion to continue oral argument [3509019-1] Response/answer due 12/28/01 for US in 01-4464, for US in 01-4463, for US in 01-4465 . in 01-4464, motion to continue oral argument [3509019-1] Response/

DATE	PROCEEDINGS
	answer due 12/28/01 for US in 01-4464, for US in 01-4463, for US in 01-4465 . in 01-4463, motion to continue oral argument [3509019-1] Response/answer due 12/28/01 for US in 01-4464, for US in 01-4463, for US in 01-4465 . in 01-4465 [01-4464, 01-4463, 01-4465] (ldj) [01-4463 01-4464 01-4465]
12/26/01	Motion filed by Appellant Arthur Hilts in 01-4465 for specific oral argument date. Date requested: 02/25 - 02/26/02 [3509892-1]. [01-4463, 01-4464, 01-4465] (rhs) [01-4463 01-4464 01-4465]
12/28/01	Response/answer filed [3511298-1] by Appellee US in 01-4463, Appellee US in 01-4464, Appellee US in 01-4465 to motion to continue oral argument [3509019-1] in 01-4465, 01-4464, 01-4465 [01-4463, 01-4464, 01-4465] (mst) [01-4463 01-4464 01-4465]
1/2/02	ORDER FILED mooting motion for specific oral arg date [3509892-1] in 01-4463, 01-4464, 01-4465, granting motion to continue oral argument [3509019-1] Argument continued until the week of 4/2/02-4/5/02. in 95-1094, 01-4464, 01-4465 Copies to all counsel. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
1/10/02	CJA 21 voucher certified for payment to Lantagne Legal Printing for Reply brief & sup. apx. [01-4463] Different Than Amount Requested? (Y/N): N. [01-4463] (lrh)

DATE	PROCEEDINGS
1/18/02	Case tentatively calendared for oral argument Term: 4/02 Place: Richmond. SUBMISSION DEADLINE: 1/28/02. (jc) [01-2012 01-2014 01-2021 01-2039 01-2044 01-2050 01-2071 01-2072 01-2074 01-2078 01-2080 01-2081 01-2086 01-2087 01-2088 01-2090 01-2091 01-2100 01-2107 01-2112 01-2115 01-2134 01-2152 01-2155 01-2163 01-2183 01-2188 01-2193 01-2197 01-2200 01-2206 01-2218 01-2233 01-2235 01-2238 01-2245 01-2258 01-2277 01-2312 01-2315 01-2318 01-2335 01-2341 01-2423 01-4170 01-4177 01-4183 01-4207 01-4243 01-4309 01-4314 01-4323 01-4463 01-4464 01-4465 01-4513 01-4531 01-4569 01-4574 01-4725 01-4728 01-6115 01-6158 01-6253 01-6480 01-6603 01-7000]
1/18/02	CJA 21 voucher certified for payment to Lantagne Legal Printing for Reply brief, Sup. jt. apx.. [01-4463] Different Than Amount Requested? (Y/N): N. [01-4463] (lrh) [01-4463]
2/8/02	Case calendared for oral argument. Scheduled Argument Date: 4/5/02. [01-4463, 01-4464, 01-4465] (jc) [01-4463 01-4464 01-4465]
2/12/02	ORDER FILED [3535038] granting attorney motion to sub aty [3535035-1] Added/appointed attorney(s) Bruce Bryan and terminated attorney Michael Joseph McCarthy for Carl J. Pasquantino in 01-4464 Is new aty fpd (Y/N)?: n Has A's Brief Been Filed (Y/N)?: Y. Copies to all counsel. [01-4464] (ldj) [01-4464]

DATE	PROCEEDINGS
2/12/02	Informal action taken mooting motion [3488403-1] in 01-4463, 01-4464, 01-4465 Copies to all counsel. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
2/15/02	CJA 21 voucher certified for payment to Lantagne Legal for brief and jt. apx. [01-4463] Different Than Amount Requested? (Y/N): N. [01-4463] (lrh) [01-4463]
3/1/02	CJA travel authorization issued to Isaac Joe in 01-4465. Internal accounting control number: [3545629-1] [01-4465, 01-4463] (elf) [01-4463 01-4465]
3/21/02	Supplemental authorities (FRAP 28(j)) filed by Appellant Carl J. Pasquantino in 01-4464, Appellant David B. Pasquantino in 01-4463, Appellant Arthur Hilts in 01-4465 [3557527-1] [01-4464, 01-4463, 01-4465] (ldj) [01-4463 01-4464 01-4465]
4/5/02	Oral argument heard. Jensen Egerton Barber for Appellant David B. Pasquantino in 01-4463, Isaac Joe for Appellant Arthur Hilts in 01-4465 Courtroom Deputy: JLC, Jr.. [01-4463, 01-4464, 01-4465] (jc) [01-4463 01-4464 01-4465]
9/30/02	Published, authored opinion filed. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
9/30/02	Judgment order filed. Decision: Reversed. Dissenting opinion filed. EOD Date: 9/30/02. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]

DATE	PROCEEDINGS
9/30/02	CJA 20 voucher issued to Jensen Egerton Barber in 01-4463, Michael Joseph McCarthy in 01-4464, Isaac Joe in 01-4465. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
10/8/02	Motion filed by Appellee US in 01-4463, Appellee US in 01-4464, Appellee US in 01-4465 to extend time to file petition for rehearing until: pending a review by the Solicitor General. [3666673-1]. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
10/15/02	COURT ORDER filed [3670033] granting motion to extend time to file pet reh until 11/13/02 [3666673-1] in 01-4463, 01-4464, 01-4465 Copies to all counsel. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
11/12/02	Petition filed by Appellee US in 01-4463, Appellee US in 01-4464, Appellee US in 01-4465 for rehearing en banc. Number of copies filed: 20 [3686730-1] [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
11/14/02	Federal Reporter Citation: 305 F.3d 291. [01-4463, 01-4464, 01-4465] (vsl) [01-4463 01-4464 01-4465]
11/25/02	Response/answer requested to motion for rehearing en banc [3686730-1] in 01-4463, motion for rehearing en banc [3686730-1] in 01-4464, motion for rehearing en banc [3686730-1] in 01-4465 [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]

DATE	PROCEEDINGS
12/2/02	Motion filed by Appellant David B. Pasquantino in 01-4463, Appellant Carl J. Pasquantino in 01-4464, Appellant Arthur Hilts in 01-4465 to extend time to file response to petition for rehearing en banc [3696973-1]. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
12/5/02	COURT ORDER filed [3698887] granting motion to extend time to file resp [3696973-1] Response/answer now due on 1/6/03 for David B. Pasquantino in 01-4463, for Carl J. Pasquantino in 01-4464, for Arthur Hilts in 01-4465 . in 01-4463, 01-4464, 01-4465 Copies to all counsel. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
12/30/02	Response/answer filed [3710779-1] by Appellant David B. Pasquantino in 01-4463, Appellant Carl J. Pasquantino in 01-4464, Appellant Arthur Hilts in 01-4465 to motion for rehearing en banc [3686730-1] in 01-4463, 01-4464, 01-4465 [01-4463, 01-4464, 01-4465] (mst) [01-4463 01-4464 01-4465]
12/30/02	Counsel of record form filed by William Beverly Poff in 01-4464, Frank Kenneth Friedman in 01-4464 for Appellant Carl J. Pasquantino in 01-4464. (ldj) [01-4464]
1/14/03	COURT ORDER filed [3718643] granting motion for rehearing en banc [3686730-1] in 01-4463, 01-4464, 01-4465 Copies to all counsel. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]

DATE	PROCEEDINGS
1/14/03	Case reopened. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
2/6/03	Case calendared for oral argument.[01-4463, 01-4464, 01-4465] (jc) [01-4463 01-4464 01-4465]
3/6/03	CJA 21 Voucher received from Lantagne Legal Printing for add'l 20 copies of brief and add'l 20 copies of reply brief. [01-4463] (pgl) [01-4463]
3/31/03	CJA travel authorization issued to Isaac Joe in 01-4465. Internal accounting control number: [3762882-1] [01-4465, 01-4463] (dh) [01-4463 01-4465]
4/1/03	Supplemental authorities (FRAP 28(j)) filed by Appellant David B. Pasquantino in 01-4463, Appellant Carl J. Pasquantino in 01-4464, Appellant Arthur Hilts in 01-4465 [3763348-1] [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
4/2/03	Oral argument heard en banc before WWW, HEW, JHW, PVN, KJW, MBM, WBT, RBK, RLG, DWS, CHH. Courtroom Deputy: LER/ SWV. Isaac Joe for Appellant Arthur Hilts in 01-4465 [01-4463, 01-4464, 01-4465] (ler) [01-4463 01-4464 01-4465]
4/4/03	Motion filed by Appellee US in 01-4463, Appellee US in 01-4464, Appellee US in 01-4465 for leave to file an attachment to the petition for rehearing en banc [3771749-1]. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]

DATE	PROCEEDINGS
4/16/03	COURT ORDER filed [3771753] granting motion for leave to file an attachment to the petition for rehearing en banc. Judge Luttig did not participate in the en banc argument and Judge Motz was recused from the matter. [3771749-1] in 01-4463, 01-4464, 01-4465 Copies to all counsel. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
6/24/03	CJA 21 voucher certified for payment to Lantagne Legal Printing for en banc brief and reply brief. [01-4463] Different Than Amount Requested? (Y/N): N. . [01-4463] (pgl) [01-4463]
7/18/03	Published, authored opinion filed. [01-4463, 01-4464, 01-4465] (ldj) [01-4463 01-4464 01-4465]
7/18/03	Judgment order filed. Decision: affirmed. Dissenting opinion filed. EOD Date: 7/18/03. [01-4463, 01-4464, 01-4465] - [3824654] (ldj) [01-4463 01-4464 01-4465]
8/11/03	Mandate issued. [01-4463, 01-4464, 01-4465] - [3836275] (jh) [01-4463 01-4464 01-4465]
8/12/03	Record on appeal returned to USDC at Baltimore. Pleadings: Vols. 1-2 T/S: Vols. 3-11 SEALED: Vols. 12-13 No. of boxes: 1 [01-4463, 01-4464, 01-4465] - [3836920] (jh) [01-4463 01-4464 01-4465]
8/26/03	ORDER FILED [3844230] granting attorney motion to appoint Bruce Bryan as appellant's csl [3844134-1] . [01-4464] [3844230] (ldj) [01-4464]

UNITED STATES DISTRICT COURT
DISTRICT OF MARYLAND (Baltimore)

[Filed: 04/13/00]

CASE # 00-CR-202-ALL

UNITED STATES OF AMERICA,
Plaintiff,

v.

DAVID B. PASQUANTINO, *et al* ,
Defendant.

DOCKET ENTRIES

DATE	NO.	PROCEEDINGS
4/13/00	1	SEALED INDICTMENT as to Sealed Defendant #1 (1) count(s) 1-6, Sealed Defendant #2 (2) count (s) 1-6, Sealed Defendant #3 (3) count(s) 1-6, Sealed Defendant #4 (4) count(s) 1-6, Sealed Defendant #5 (5) count(s) 1-6, 7, Sealed Defendant #6 (6) count(s) 1-6, Sealed Defendant #7 (7) count(s) 1-6 (jl) [Entry date 04/14/00]
4/13/00	2	MOTION by USA to Seal indictment (c/s) (jl) [Entry date 04/14/00]
4/13/00	2	ORDER SEALING this indictment except that the Clerk shall furnish the U.S. Attorney with 7 certified copies of the indictment (Signed by Magistrate Judge Beth P. Gesner 4/13/00) (jl) [Entry date 04/20/00]

DATE	NO.	PROCEEDINGS
5/3/00	3	ORDER as to Sealed Defendant #1, for issuance of Bench warrant (Signed by Magistrate Judge Susan K. Gauvey 5/3/00) (jl) [Entry date 05/03/00]
5/3/00	4	ORDER as to Sealed Defendant #2, for issuance of Bench warrant (Signed by Magistrate Judge Susan K. Gauvey 5/3/00) (jl) [Entry date 05/03/00]
5/3/00	5	ORDER as to Sealed Defendant #3, for issuance of Bench warrant (Signed by Magistrate Judge Susan K. Gauvey 5/3/00) (jl) [Entry date 05/03/00]
5/3/00	6	ORDER as to Sealed Defendant #4, for issuance of Bench warrant (Signed by Magistrate Judge Susan K. Gauvey 5/3/00) (jl) (Entry date 05/03/00]
5/3/00	7	ORDER as to Sealed Defendant #5, for issuance of Bench warrant (Signed by Magistrate Judge Susan K. Gauvey 5/3/00) (jl) [Entry date 05/03/00]
5/3/00	8	ORDER as to Sealed Defendant #6, for issuance of Bench warrant (Signed by Magistrate Judge Susan K. Gauvey 5/3/00) (jl) [Entry date 05/03/00]
5/3/00	9	ORDER as to Sealed Defendant #7, for issuance of Bench warrant (Signed by Magistrate Judge Susan K. Gauvey 5/3/00) (jl) [Entry date 05/03/00]
5/3/00	10	Bench WARRANT issued as to Sealed Defendant #1 (jl) [Entry date 05/03/00]

DATE	NO.	PROCEEDINGS
5/3/00	11	Bench WARRANT issued as to Sealed Defendant #2 (jl) [Entry date 05/03/00]
5/3/00	12	Bench WARRANT issued as to Sealed Defendant #3 (jl) [Entry date 05/03/00]
5/3/00	13	Bench WARRANT issued as to Sealed Defendant #4 (jl) [Entry date 05/03/00]
5/3/00	14	Bench WARRANT issued as to Sealed Defendant #5 (jl) [Entry date 05/03/00]
5/3/00	15	Bench WARRANT issued as to Sealed Defendant #6 (jl) [Entry date 05/03/00]
5/3/00	16	Bench WARRANT issued as to Sealed Defendant #7 (jl) [Entry date 05/03/00]
5/4/00	17	Bench WARRANT Returned Executed as to David B. Pasquantino on 5/4/00 (jl) [Entry date 05/05/00]
5/4/00	—	Initial appearance as to David B. Pasquantino held before Magistrate Judge Susan K. Gauvey (ER: Davis) (Defendant informed of rights.) (jl) [Entry date 05/05/00]
5/4/00	18	ORDER Setting Conditions of Release as to David B.Pasquantino (Signed by Magistrate Judge Susan K.Gauvey 5/4/00) (c/d 5/4/00 sjd) (jl) [Entry date 05/05/00]
5/4/00	19	MOTION by USA as to David B. Pasquantino, Sealed Defendant #2, Sealed Defendant #3, Sealed Defendant #4, Sealed Defendant #5, Sealed Defendant #6, Sealed Defendant #7 to unseal indictment (jl) [Entry date 05/05/00]

DATE	NO.	PROCEEDINGS
5/4/00	20	ORDER DIRECTING indictment shall no longer be maintained under seal as to David B. Pasquantino, Sealed Defendant #2, Sealed Defendant #3, Sealed Defendant #4, Sealed Defendant #5, Sealed Defendant #6, Sealed Defendant #7 (Signed by Magistrate Judge Susan K. Gauvey 5/4/00) (c/m 5/5/00 jl) (jl) [Entry date 05/05/00]
5/8/00	21	CJA 23 FINANCIAL AFFIDAVIT by David B. Pasquantino (eg) [Entry date 05/08/00]
5/8/00	22	ORDER DIRECTING defendant to pay $750.00 towards legal fees at this time subject to revision as to David B. Pasquantino (Signed by Magistrate Judge Susan K. Gauvey 5/8/00) (c/m 5/8/00 js) (eg) [Entry date 05/08/00]
5/12/00	23	CORRESPONDENCE by USA to Counsel for David B. Pasquantino re Discovery Agreement Conditions (ms) [Entry date 05/15/00]
5/12/00	—	Arraignment as to David B. Pasquantino, Not Guilty: count(s) 1-6 held before Magistrate Judge James K. Bredar (ER: S. Davis) (ms) [Entry date 05/15/00]
5/12/00	24	NOTICE of Appearance for David B. Pasquantino by Attorney Jensen Egerton Barber pursuant to CJA Act (ms) [Entry date 05/15/00]

DATE	NO.	PROCEEDINGS
5/12/00	25	ORDER REQUIRING Court appointed counsel as well as Government counsel to bring matter of defendant David B. Pasquantino's possible ability to contribute financially toward payment of counsel fees to the attention of the Judicial Officer at time of conviction or acquittal. (Signed by Magistrate Judge James K. Bredar 5/12/00) (c/d 5/12/00 sd) (ms) [Entry date 05/15/00]
5/12/00	—	Arraignment as to Carl J. Pasquantino, Not Guilty: Carl J. Pasquantino (2) count(s) 1-6 held before Magistrate Judge James K. Bredar (ER: S. Davis) (ms) [Entry date 05/15/00]
5/12/00	26	CJA 23 FINANCIAL AFFIDAVIT by Carl J. Pasquantino (ms) [Entry date 05/15/00]
5/12/00	27	NOTICE of Appearance for Carl J. Pasquantino by Attorney Michael J. McCarthy (ms) [Entry date 05/15/00]
5/12/00	28	ORDER REQUIRING CJA counsel as well as Government counsel to bring matter as to Defendant Carl J. Pasquantino's potential to contribute financially toward payment of counsel fees to attention of Judicial Officer at time of conviction or acquittal. (Signed by Magistrate Judge James K. Bredar 5/12/00) (c/d 5/12/00 sd) (ms) [Entry date 05/15/00]
5/12/00	—	Initial appearance as to Carl J. Pasquantino held before Magistrate Judge James K. Bredar (ER: S. Davis) (Defendant informed of rights.) (ms) [Entry date 05/15/00]

DATE	NO.	PROCEEDINGS
5/12/00	—	Initial appearance as to Francis A. Gillotti held before Magistrate Judge James K. Bredar (ER: S. Davis) (Defendant informed of rights.) (ms) [Entry date 05/15/00]
5/12/00	—	Arraignment as to Francis A. Gillotti, Not Guilty: Francis A. Gillotti (4) count(s) 1-6 held before Magistrate Judge James K. Bredar (ER: S. Davis) (ms) [Entry date 05/15/00]
5/12/00	29	CJA 23 FINANCIAL AFFIDAVIT by Francis A. Gillotti (ms) [Entry date 05/15/00]
5/12/00	30	NOTICE of Appearance for Francis A. Gillotti by Attorney David R. Solomon (ms) [Entry date 05/15/00]
5/12/00	31	ORDER REQUIRING CJA Counsel as well as Government counsel to bring to the attention of the judicial Officer the defendant Francis A. Gillotti's possible potential to contribute financially toward payment of his counsel fees at the time of conviction or acquittal. (Signed by Magistrate Judge James K. Bredar 5/12/00) (c/d 5/12/00 sd) (ms) [Entry date 05/15/00]
5/12/00	—	Initial appearance as to Arthur Hilts held before Magistrate Judge James K. Bredar (ER: S. Davis) (Defendant informed of rights.) (ms) [Entry date 05/15/00]
5/12/00	—	Arraignment as to Arthur Hilts, Not Guilty: Arthur Hilts (7) count(s) 1-6 held before Magistrate judge James K. Bredar (ER: S. Davis) (ms) [Entry date 05/15/00]

DATE	NO.	PROCEEDINGS
5/12/00	32	CJA 23 FINANCIAL AFFIDAVIT by Arthur Hilts (ms) [Entry date 05/15/00]
5/12/00	33	ORDER REQUIRING CJA and Government Counsel to bring to Court's attention the possible potential of defendant Arthur Hilts to contribute financially toward the payment of his counsel fees at the time of conviction or acquittal. (Signed by Magistrate Judge James K. Bredar 5/12/00) (c/d 5/12/00 sd) (ms) [Entry date 05/15/00]
5/12/00	—	Initial appearance as to Gerard T. Ciccone held before Magistrate Judge James K. Bredar (ER: S. Davis) (Defendant informed of rights.) (ms) [Entry date 05/15/00]
5/12/00	—	Arraignment as to Gerard T. Ciccone, Not Guilty: Gerard T. Ciccone (5) count(s) 1-6, 7 held before Magistrate Judge James K. Bredar (ER: S. Davis) (ms) [Entry date 05/15/00]
5/12/00	34	CJA 23 FINANCIAL AFFIDAVIT by Gerard T. Ciccone (ms) [Entry date 05/15/00]
5/12/00	35	NOTICE of Appearance for Gerard T. Ciccone by Attorney Nancy Maggitti Cohen (ms) [Entry date 05/15/00]
5/12/00	36	ORDER REQUIRING CJA and Government Counsel to bring the fact that the defendant Gerard T. Ciccone may have sufficient resources to contribute financially toward the payment of his counsel fees to the attention of the Judicial Officer at the

DATE	NO.	PROCEEDINGS
		time of conviction or acquittal. (Signed by Magistrate Judge James K. Bredar 5/12/00) (c/d 5/12/00 sd) (ms) [Entry date 05/15/00]
5/12/00	37	ORDER MODIFYING Conditions of Release previously imposed as to Gerard T. Ciccone in WDNY restricting defendant from visiting and/or entering, accessing OffTrack Betting Facilities. All other conditions of release ordered on May 4, 2000 in WDNY remain in full force and effect. (Signed by Magistrate Judge James K. Bredar 5/12/00) (c/m Pretrial 5/12/00 cw) (c/m 5/15/00 ms) (ms) [Entry date 05/15/00]
5/12/00	38	ORDER REQUIRING CJA and Government Counsel to bring the fact that defendant Cosmo D. Candido may have sufficient resources to contribute financially toward the payment of his counsel fees to the attention of the Judicial Officer at the time of conviction or acquittal. (Signed by Magistrate Judge James K. Bredar 5/12/00) (c/d 5/12/00 sd) (ms) [Entry date 05/15/00]
5/12/00	—	Initial appearance as to Cosmo D. Candido held before Magistrate Judge James K. Bredar (ER: S. Davis) (Defendant informed of rights.) (ms) [Entry date 05/15/00]
5/12/00	39	CJA 23 FINANCIAL AFFIDAVIT by Cosmo D. Candido (ms) [Entry date 05/15/00]

DATE	NO.	PROCEEDINGS
5/12/00	40	ORDER MODIFYING the Conditions of Release previously imposed in the WDNY as to Cosmo D. Candido. All other conditions of release remain in full force and effect. (Signed by Magistrate Judge James K. Bredar 5/12/00) (cm 5/12/00 Pretrial Services cw) (c/m 5/15/00 ms) (ms) [Entry date 05/15/00]
5/16/00	41	CJA 20 as to Carl J. Pasquantino Appointment of Attorney Michael J. McCarthy (c/m 5/15/00 dps) (jl) [Entry date 05/17/00]
5/16/00	42	CJA 20 as to Cosmo D. Candido Appointment of Attorney Dominic Fleming (c/m 5/15/00 dps) (jl) [Entry date 05/17/00]
5/16/00	43	CJA 20 as to Arthur Hilts Appointment of Attorney Isaac Joe (c/m 5/15/00 dps) (jl) [Entry date 05/17/00]
5/16/00	44	CJA 20 as to Gerard T. Ciccone Appointment of Attorney Nancy M. Cohen (c/m 5/15/00 dps) (jl) [Entry date 05/17/00]
5/16/00	45	CJA 20 as to Francis A. Gillotti Appointment of Attorney David Richard Soloman (c/m 5/15/00 dps) (jl) [Entry date 05/17/00]
5/18/00	46	JOINT MOTION by Cosmo D. Candido, USA for Psychological Exam (jl) [Entry date 05/18/00]
5/18/00	47	ORDER DIRECTING the defendant shall be examined as therein set forth as to Cosmo D. Candido (Signed by Magistrate Judge James K. Bredar 5/17/00) (c/m 5/18/00 cw) (jl) [Entry date 05/18/00]

DATE	NO.	PROCEEDINGS
5/18/00	48	Bench WARRANT Returned Executed as to Carl J. Pasquantino on 5/4/00 (jl) [Entry date 05/19/00]
5/18/00	49	Bench WARRANT Returned Executed as to Arthur Hilts on 5/4/00 (jl) [Entry date 05/19/00]
5/18/00	50	Bench WARRANT Returned Executed as to Francis A. Gillotti on 5/4/00 (jl) [Entry date 05/19/00]
5/18/00	51	Bench WARRANT Returned Executed as to Cosmo D. Candido on 5/4/00 (jl) [Entry date 05/19/00]
519/00	52	SEALED DOCUMENT (jl) [Entry date 05/19/00]
5/23/00	53	CJA 20 as to David B. Pasquantino: Appointment of Attorney Jensen Barber (c/m 5/22/00 dps) (jl) [Entry date 05/23/00]
5/26/00	54	MOTION by Carl J. Pasquantino to Extend Time to file pretrial motions (cag) [Entry date 05/30/00]
5/30/00	55	MOTION by Cosmo D. Candido to Extend Time to file Motions (cag) [Entry date 05/30/00]
5/30/00	56	ORDER as to Carl J. Pasquantino granting [54-1] motion to Extend Time to file pretrial motions as to Carl J. Pasquantino (2) (Signed by Chf Judge J. F. Motz 5/30/00) (c/m 5/30/00-cag) (cag) [Entry date 05/30/00]

DATE	NO.	PROCEEDINGS
5/31/00	57	Letter MOTION by Gerard T. Ciccone to Extend Time to file motions (jl) [Entry date 06/01/00]
5/31/00	57	ORDER granting [57-1] letter motion to Extend Time to file motions until 6/30/00 as to Gerard T. Ciccone (5) (Signed by Chf Judge J. F. Motz 5/31/00) (c/m 6/1/00 jl) (jl) [Entry date 06/01/00]
6/12/00	58	SEALED DOCUMENT (jl) [Entry date 06/16/00]
6/12/00	59	SEALED DOCUMENT (jl) [Entry date 06/16/00]
6/12/00	60	SEALED DOCUMENT (jl) [Entry date 06/16/00]
6/23/00	61	MOTION by David B. Pasquantino to Modify Conditions of Release (c/s) (jl) [Entry date 06/23/00]
7/26/00	62	Letter MOTION by Gerard T. Ciccone to Extend Time for filing motions (jl) [Entry date 07/26/00]
7/26/00	62	ORDER granting [62-1) letter motion to Extend Time for filing motions until 8/15/00 as to Gerard T. Ciccone (5} Signed by Chf Judge J. F. Motz 7/26/00) (c/m 7/26/00 gs) (jl) [Entry date 07/26/00]
7/26/00	63	MOTION by Carl J. Pasquantino to Adopt and conform Motions and Request for hearing (c/s) (ji) [Entry date 07/27/00] [Edit date 07/27/00]

DATE	NO.	PROCEEDINGS
7/26/00	64	MOTION by Carl J. Pasquantino for pretrial determination of the admissability of tape recorded conversations and Request for hearing (c/s) (jl) [Entry date 07/27/00]
7/26/00	65	MOTION by Carl J. Pasquantino for disclosure of confidential informants or unnamed and unindicted co-conspirators (c/s) (jl) [Entry date 07/27/00]
7/26/00	66	MOTION by Carl J. Pasquantino for exculpatory evidence (c/s) (j1) [Entry date 07/27/00]
7/26/00	67	MOTION by Carl J. Pasquantino for Severance of defendants (c/s) (jl) [Entry date 07/27/00]
7/26/00	68	MOTION by Carl J. Pasquantino for notice of intent to use and description of 404(b) evidence and Request for hearing (c/s) (jl) [Entry date 07/27/00]
7/26/00	69	MOTION by David B. Pasquantino, Carl J. Pasquantino to Suppress evidence and Request for hearing (cis) (jl) [Entry date 07/27/00]
7/28/00	70	MOTION with Memorandum in Support by David B. Pasquantino, Carl J. Pasquantino to Dismiss indictment; and Request for hearing (c/s) (jl) [Entry date 07/28/00]
7/28/00	71	MOTION by David B. Pasquantino for Bill of Particulars (c/s) (ji) [Entry date 07/28/00]
7/28/00	72	MOTION by David B. Pasquantino to Adopt and conform Co-Defendants' motions (c/s) (jl) [Entry date 07/28/00]

DATE	NO.	PROCEEDINGS
7/28/00	73	MOTION by Arthur Hilts to Adopt all Motions by Co-Defendants (c/s) (jl) [Entry date 07/28/00]
[Illegible]	74	MOTION by Francis A. Gillotti to Join in motions filed by co-defendants, and for Leave to File Further Motions (c/s) (jl) [Entry date 08/07/00]
8/10/00	75	Bench WARRANT Returned Executed as to Gerard T. Ciccone on 5/8/00 (jl) [Entry date 08/10/00]
8/14/00	76	MOTION by Gerard T. Ciccone to Adopt Motion of Other Defendants, and for Leave to File Further Motions (c/s) (ji) [Entry date 08/14/00]
8/31/00	77	CONSOLIDATED RESPONSE by USA as to David B. Pasquantino, Carl J. Pasquantino, Terry Fraser, Francis A. Gillotti, Gerard T. Ciccone, Cosmo D. Candido, Arthur Hilts re Pretrial Motions and Attachments A-E (c/s) (jl) [Entry date 09/01/00]
9/7/00	78	REPLY by David B. Pasquantino, Carl J. Pasquantino to government's opposition to their [70-1] motion to Dismiss indictment (c/s) (jl) [Entry date 09/08/00]
9/7/00	—	Motion hearing held before Chief Judge J. Frederick Motz as to David B. Pasquantino, Carl J. Pasquantino, Terry Fraser, Francis A. Gillotti, Gerard T. Ciccone, Cosmo D. Candido, Arthur Hilts re: Pending Motions. (Court Reporter: Mary Zajac) (kam) [Entry date 09/08/00]

DATE	NO.	PROCEEDINGS
[Illegible]	—	Argument of Counsel made by David B. Pasquantino and Carl J. Pasquantino. (kam) [Entry date 09/08/00]
9/7/00	—	ORAL ORDER as to David B. Pasquantino, Carl J. Pasquantino, Terry Fraser, Francis A. Gillotti, Gerard T. Ciccone, Cosmo D. Candido, Arthur Hilts "DENYING" all Motions as stated in open Court. (Chf Judge J. F. Motz 9/7/00) (kam) [Entry date 09/08/00]
9/7/00	—	Minute entry as to David B. Pasquantino, Carl J. Pasquantino, Terry Fraser, Francis A. Gillotti, Gerard T. Ciccone, Cosmo D. Candido, Arthur Hilts: Trial date scheduled for Februrary 5, 2001; Status Report to the Court due by Friday, December 1, 2000. (kam) [Entry date 09/08/00]
1/5/01	79	MOTION by Gerard T. Ciccone to Modify Conditions of Release (jl) [Entry date 01/09/01]
1/8/01	80	ORDER MODIFYING conditions of release as to Gerard T. Ciccone (Signed by Magistrate Judge James K. Bredar 1/5/01) (c/m 1/8/01 cw) (jl) [Entry date 01/09/01]
2/2/01	—	Rearraignment as to Francis A. Gillotti, Guilty: Francis A. Gillotti (4) count(s) 1 Terminated motions, Not Guilty: Francis A. Gillotti (4) count(s) 6 held before Chf Judge J. F. Motz (Court Reporter: Mary Zajac) (jl) [Entry date 02/05/01]

DATE	NO.	PROCEEDINGS
2/2/01	81	Exhibit list (Plea Agreement) by USA as to Francis A. Gillotti (jl) [Entry date 02/05/01]
2/2/01	82	Guideline Sentencing Order as to Francis A. Gillotti (Signed by Chf Judge J. F. Motz 2/2/01) (jl) [Entry date 02/05/01]
2/5/01	—	Jury trial - Day 1 - held before Chf Judge J. F. Motz as to David B. Pasquantino, Carl J. Pasquantino, Arthur Hilts. (Court Reporter: Mary Zajac) (kam) [Entry date 02/05/01]
2/5/01	—	Jurors Sworn and Examined on Voir Dire as to David B. Pasquantino (1) count(s) 1-6, Carl J. Pasquantino (2) count(s) 1-6, Arthur Hilts (7) count(s) 1-6 Terminated motions before Chf Judge J. F. Motz. (kam) [Entry date 02/05/01]
2/5/01	—	Jury impaneled as to David B. Pasquantino, Carl J. Pasquantino and Arthur Hilts. (kam) [Entry date 02/05/01]
2/5/01	—	Minute entry as to David B. Pasquantino, Carl J. Pasquantino, Arthur Hilts: Court's preliminary instructions to the Jury. (kam) [Entry date 02/06/01]
2/5/01	—	Minute entry as to David B. Pasquantino, Carl J. Pasquantino, Arthur Hilts: Case not concluded, to resume on Tuesday, February 6, 2001 @ 10:00 a.m. (kam) [Entry date 02/06/01]

DATE	NO.	PROCEEDINGS
2/5/01	—	Motion hearing held before Judge J. Frederick Motz as to Arthur Hilts, David B. Pasquantino, Carl J. Pasquantino re: Oral motion of Defendant, Arthur Hilts, for new counsel-argued- . Hearing continued in Chambers on the record. Oral Order (Motz, C. J.) "denying" defendant's motion/ request for appointment of new counsel. Oral order (Mott, C.J.) "denying" motion of Defendant, David Pasquantino, to Dismiss Indictment. (kam) [Entry date 02/06/01]
2/5/01	83	MOTION with Memorandum in Support by David B. Pasquantino, Carl J. Pasquantino to Dismiss indictment and Attachments A-I (c/s) (jl) [Entry date 02/07/01]
2/5/01	—	Rearraignment as to Gerard T. Ciccone, Guilty: Gerard T. Ciccone (5) count (s) 1, Not Guilty: Gerard T. Ciccone (5) count (s) 2-6, 7 held before Chf Judge J. F. Motz (Court Reporter: Mary Zajac) (jl) [Entry date 02/07/01]
2/5/01	84	Exhibit list (Plea Agreement) by USA as to Gerard T. Ciccone (jl) [Entry date 02/07/01]
2/5/01	85	Guideline Sentencing Order as to Gerard T. Ciccone (Signed by Chf Judge J. F. Motz 2/5/01) (c/m 2/6/01 kam) (jl) [Entry date 02/07/01]
2/6/01	—	Jury trial - Day 2 - held before Chf Judge J. F. Motz as to David B. Pasquantino, Carl J. Pasquantino and Arthur Hilts. (Court Reporter: Mary Zajac) (kam) [Entry date 02/06/01]

DATE	NO.	PROCEEDINGS
2/6/01	—	ORAL ORDER as to Arthur Hilts "DENYING" Motion for appointment of new counsel, for reasons stated in open Court. (Chf Judge J. F. Motz 2/6/01) (kam) [Entry date 02/06/01]
2/6/01	—	Jury sworn as to David B. Pasquantino, Carl J. Pasquantino and Arthur Hilts. (kam) [Entry date 02/06/01]
2/6/01	—	Opening Statements made by David B. Pasquantino, Carl J. Pasquantino and Arthur Hilts. (kam) [Entry date 02/06/01]
2/6/01	—	Minute entry as to David B. Pasquantino, Carl. J. Pasquantino, Arthur Hilts: Case not concluded, to resume on Wednesday, February 7, 2001 @ 9:30 a.m. (kam) [Entry date 02/06/01]
2/7/01	—	Jury trial - Day 3 - held before Chf Judge J. F. Motz as to David B. Pasquantino, Carl J. Pasquantino and Arthur Hilts. (Court Reporter: Mary Zajac) (kam) [Entry date 02/07/01]
2/7/01	—	Hearing out of the presence of the jury as to Arthur Hilts and Alternate Juror #2 held before Chf Judge J. F. Motz. (Court Reporter: Mary Zajac) (kam). [Entry date 02/07/01]
2/7/01	—	Minute entry as to David B. Pasquantino, Carl J. Pasquantino and Arthur Hilts: Juror #11 was excused from further consideration of the case. Alternate Juror #1 became Juror #11. (kam) [Entry date 02/07/01]

DATE	NO.	PROCEEDINGS
2/8/01	—	Jury trial - Day 4 - held before Chf Judge J. F. Motz as to David B. Pasquantino, Carl J. Pasquantino and Arthur Hilts. (Court Reporter: Mary Zajac) (kam) [Entry date 02/08/01]
2/12/01	—	Jury trial - Day 5 - held before Chf Judge J. F. Motz as to David B. Pasquantino, Carl J. Pasquantino and Arthur Hilts. (Court Reporter: Mary Zajac) (kam) [Entry date 02/12/01]
2/12/01	—	ORAL MOTION by David B. Pasquantino for Judgment of Acquittal made at the conclusion of the government's case-in-chief. (kam) [Entry date 02/12/01]
2/12/01	—	ORAL MOTION by Carl J. Pasquantino for Judgment of Acquittal made at the conclusion of the government's case-in-chief. (kam) [Entry date 02/12/01]
2/12/01	—	ORAL MOTION by Arthur Hilts for Judgment of Acquittal made at the conclusion of the government's case-in-chief. (kam) [Entry date 02/12/01]
2/12/01	—	Argument of Counsel made by David B. Pasquantino, Carl J. Pasquantino, Arthur Hilts and USA. (kam) [Entry date 02/12/01]
2/12/01	—	ORAL ORDER "DENYING" [0-0] oral motion for Judgment of Acquittal made at the conclusion of the government's case-in-chief as to Carl J. Pasquantino (2), "DENYING" (0-0) oral motion for Judgment of Acquittal made at the

DATE	NO.	PROCEEDINGS
		conclusion of the government's case-in-chief as to David B. Pasquantino (1). (Chf Judge F. Motz 2/12/01) (kam) [Entry date 02/12/01]
2/12/01	—	ORAL ORDER as to Arthur Hilts granting in part, denying in part [0-0] oral motion for Judgment of Acquittal made at the conclusion of the government's case-in-chief as to Arthur Hilts (7) (Chf Judge J. F. Motz) (kam) [Entry date 02/12/01]
2/12/01	—	ORAL MOTION by David B. Pasquantino and Carl J. Pasquantino for Judgment of Acquittal made at the conclusion of all the evidence. (kam) [Entry date 02/12/01]
2/12/01	—	Argument of Counsel made by David B. Pasquantino, Carl J. Pasquantino and USA. (kam) [Entry date 02/12/01]
2/12/01	—	ORAL ORDER "DENYING" [0-0] oral motion for Judgment of Acquittal made at the conclusion of all the evidence as to David B. Pasquantino (1) and Carl J. Pasquantino (2). (Chf Judge J. F. Motz 2/12/01) (kam) [Entry date 02/12/01]
2/12/01	—	ORAL MOTION by Arthur Hilts for Judgment of Acquittal as to Count 1 made at the conclusion of all the evidence. (kam) [Entry date 02/12/01]
2/12/01	—	Argument of Counsel made by Arthur Hilts and USA. (kam) [Entry date 02/12/01]

DATE	NO.	PROCEEDINGS
2/12/01	—	ORAL ORDER "DENYING" [0-0] oral motion for Judgment of Acquittal as to Count 1 made at the conclusion of all the evidence as to Arthur Hilts (7). (Judge J. F. Motz 2/12/01) (kam) [Entry date 02/12/01]
2/12/01	—	Minute entry as to David B. Pasquantino, Carl J. Pasquantino, Arthur Hilts: Discussion of Jury Instructions. (kam) [Entry date 02/12/01]
2/12/01	—	Minute entry as to David B. Pasquantino, Carl J. Pasquantino and Arthur Hilts: Case not concluded, to resume on Tuesday, February 13, 2001 @ 10:00 a.m. (kam) [Entry date 02/12/01]
2/12/01	86	REQUESTED Jury instructions as to David B. Pasquantino (c/hd chambers) (jl) [Entry date 02/12/01]
2/13/01	—	Jury trial - Day 6 - held before Chf Judge J. F. Motz as to David B. Pasquantino, Carl J. Pasquantino and Arthur Hilts. (Court Reporter: Lisa K. Bankins) (kam) [Entry date 02/13/01]
2/13/01	—	Court's Charge to the Jury as to David B. Pasquantino, Carl J. Pasquantino and Arthur Hilts. (kam) [Entry date 02/13/01]
2/13/01	—	Closing Statements by counsel for David B. Pasquantino, Carl J. Pasquantino, Arthur Hilts and USA. (kam) [Entry date 02/13/01]

DATE	NO.	PROCEEDINGS
2/13/01	—	Bailiff CSO William Berttison Sworn as to David B. Pasquantino, Carl J. Pasquantino and Arthur Hilts. (kam) [Entry date 02/13/01]
2/13/01	—	VERDICT: David Pasquantino "GUILTY" as to Counts 1 -6; Carl Pasquantino "GUILTY" as to Counts 1 -6; Arthur Hilts "GUILTY" as to Count 1. (kam) [Entry date 02/13/01]
2/13/01	—	Minute entry as to David B. Pasquantino, Carl J. Pasquantino and Arthur Hilts: Jury polled at the request of the defendants. (kam) [Entry date 02/13/01]
2/13/01	87	Exhibit list by USA as to David B. Pasquantino (jl) [Entry date 02/14/01]
2/13/01	88	Exhibit list by David B. Pasquantino (jl) [Entry date 02/14/01]
2/13/01	89	Exhibit list by Carl J. Pasquantino (jl) [Entry date 02/14/01]
2/13/01	90	Certification - Exhibits to be submitted to jury (jl) [Entry date 02/14/01]
2/13/01	91	Stipulation regarding return of exhibits to the custody of and retained by counsel who offered them pending appeal (jl) [Entry date 02/14/01]
2/14/01	92	Guideline Sentencing Order as to Carl J. Pasquantino (Signed by Chf Judge J. F. Motz 2/13/01) (c/m 2/14/01 kam) (jl) [Entry date 02/14/01]

DATE	NO.	PROCEEDINGS
2/14/01	93	Guideline Sentencing Order as to David B. Pasquantino (Signed by Chf Judge J. F. Motz 2/13/01) (c/m 2/14/01 kam) (jl) [Entry date 02/14/01]
2/14/01	94	Guideline Sentencing Order as to Arthur Hilts (Signed by Chf Judge J. F. Motz 2/13/01) (c/m 2/14/01 kam) (jl) [Entry date 02/14/01]
2/16/01	95	Authorization for juror meal (signed by Felicia C. Cannon, Clerk 2/14/01) (jl) [Entry date 02/20/01]
2/16/01	—	ORAL MOTION by Arthur Hilts for Judgment of Acquittal as to Counts 2, 3, 4, 5 and 6 (jl) [Entry date 02/20/01]
2/16/01	96	ORDER as to Arthur Hilts granting [0-0] oral motion for Judgment of Acquittal as to Counts 2, 3, 4, 5 and 6 as to Arthur Hilts (7) (Signed by Chf Judge J. F. Motz) (c/m 2/20/01 jl) (jl) [Entry date 02/20/01]
2/16/01	—	DISMISSAL of Count(s) as to Arthur Hilts Terminated motions Counts Dismissed: Arthur Hilts (7) count (s) 2-6 (j1) [Entry date 02/20/01]
2/20/01	97	ORDER SETTING date for competency hearing as to Cosmo D. Candido (Signed by Magistrate Judge James K. Bredar 2/20/01) (c/m 2/20/01 cw) (jl) [Entry date 02/21/01]

DATE	NO.	PROCEEDINGS
3/15/01	98	ORDER DISMISSING the indictment as to Cosmo D. Candido (Signed by Chf Judge J. F. Motz 3/15/01) (c/m 3/15/01 j1) (MICROFILMED 3/16/01) (jl) [Entry date 03/16/01]
3/15/01	—	DISMISSAL of Count(s) as to Cosmo D. Candido Terminated motions terminating [55-1] motion to Extend Time to file Motions as to Cosmo D. Candido (6) Counts Dismissed: Cosmo D. Candido (6) count(s) 1-6 (j1) [Entry date 03/16/01]
4/11/01	—	Sentencing: Gerard T. Ciccone (5) count(s) 1 held before Chf Judge J. F. Motz.(Court Reporter: Mary Zajac) (kam) [Entry date 04/11/01]
4/11/01	99	JUDGMENT Gerard T. Ciccone (5) count(s) 1. IMPRISONMENT for a total term of 5 months; Supervised Release for a term of 2 years; Assessment $100.00, Gerard T. Ciccone (5) count(s) 2-6, 7 DISMISSED (Signed by Chf Judge J. F. Motz 4/11/01) (c/m-cc/USM 4/12/01-jan) (MICROFILMED 4/12/01) (jb) (jan) [Entry date 04/12/01]
4/11/01	—	DISMISSAL of Count(s) as to Gerard T. Ciccone Terminated motions terminating [76-1] motion to Adopt Motion of Other Defendants as to Gerard T. Ciccone (5), terminating [76-2] motion for Leave to File Further Motions as to Gerard T. Ciccone (5) Counts Dismissed: Gerard T. Ciccone (5) count(s) 2-6, 7 (jan) [Entry date 04/12/01]

DATE	NO.	PROCEEDINGS
4/24/01	—	Sentencing Francis A. Gillotti (4) count(s) 1 held before Chf Judge J. F. Motz (Court Reporter: M. Zajac) (eg) [Entry date 04/24/01] [Edit date 04/30/01]
4/24/01	100	JUDGMENT Francis A. Gillotti (4) count(s) 1. Defendant placed on probation for a period of 2 years; and Special Assessment of $100.00, count (s) 2-5, 6 - Dismissed on the motion of the United States. (Signed by Chf Judge J. F. Motz 4/24/01) (c/m & microfilmed 4/24/01 eg) (eg) [Entry date 04/24/01) [Edit date 04/30/01]
5/10/01	101	LETTER/MOTION by Gerard T. Ciccone to Extend Surrender date (eg) [Entry date 05/10/01]
5/10/01	101	ORDER as to Gerard T. Ciccone granting [101-1] motion to Extend Surrender date as to Gerard T. Ciccone (5) (Signed by Chf Judge J. F. Motz 5/10/01) (c/m 5/10/01 gs) (cc' USMS 5/10/01 eg) (eg) [Entry date 05/10/01]
5/14/01	102	AMENDED JUDGMENT as to defendant Gerard T. Ciccone correct SSN and D/O/B: (Signed by CM Judge J. F. Motz 5/14/01) (c/m & microfilmed 5/14/01) (JB) (eg) [Entry date 05/14/01]
5/23/01	103	SENTENCING MEMORANDUM by Carl J. Pasquantino and attachments (c/s) (eg) [Entry date 05/23/01]

DATE	NO.	PROCEEDINGS
5/30/01	104	SENTENCING MEMORANDUM by Arthur Hilts and attachment (c/s) (eg) [Entry date 05/30/01]
6/4/01	105	RESPONSE by USA as to Carl J. Pasquantino Sentencing Memorandum (c/s) (eg) [Entry date 06/04/01]
6/4/01	106	RESPONSE by USA as to Arthur Hilts Sentencing Memorandum (c/s) (eg) [Entry date 06/04/01]
6/6/01	107	MOTION by David B. Pasquantino for Bond Pending Appeal and Exhibit 1 (c/s) (eg) [Entry date 06/06/01]
6/6/01	108	MOTION by David B. Pasquantino for Brady Information (c/s) (eg) [Entry date 06/06/01]
6/6/01	109	SENTENCING MEMORANDUM by David B. Pasquantino (cis) (eg) [Entry date 06/06/01]
6/8/01	110	RESPONSE by USA to David B. Pasquantino's Sentencing Memorandum and [108-1] motion of David B. Pasquantion for Brady Information, [107-1] motion of David B. Pasquantion for Bond Pending Appeal and attachments (c/s) (eg) [Entry date 06/08/01]
6/8/01	—	Sentencing: David B. Pasquantino (1) count(s) 1-6, Carl J. Pasquantino (2) count(s) 1-6, Arthur Hilts (7) count(s) 1 held before Chf Judge J. F. Motz. (Court Reporter: Mary Zajac) (kam) [Entry date 06/08/01]

DATE	NO.	PROCEEDINGS
6/8/01	111	Exhibit list by David B. Pasquantino (eg) [Entry date 06/12/01]
6/8/01	112	Exhibit list by Carl J. Pasquantino (eg) [Entry date 06/12/01]
6/12/01	113	JUDGMENT David B. Pasquantino (1) count(s) 1-6. Imprisonment 57 months 1-6 to run concurrently with each other; Supervised Release 3 years as to counts 1-6 to run concurrently with each other; Special Assessment $600.00 (Signed by Chf Judge J. F. Motz 6/12/01) (c/m & microfilmed 6/13/01) (JB) (eg) [Entry date 06/13/01]
6/12/01	114	JUDGMENT Carl J. Pasquantino (2) count(s) 1-6. Imprisonment 57 months as to counts 1-6 to run concurrently with each other. Supervised Release 3 years as to counts 1-6 to run concurrently with each other; Special Assessment $600.00 (Signed by Chf Judge J. F. Motz 6/13/01) (c/m 6/13/01) (microfilmed) 6/12 (eg) [Entry date 06/13/01]
6/12/01	115	NOTICE OF APPEAL by David B. Pasquantino (1) count(s) 1-6 FILING FEE $ (IFP-CJA) (Appeal rec'd on 6/8/01) (c/s) (ko) [Entry date 06/13/01]
6/12/01	116	NOTICE OF APPEAL by Carl J. Pasquantino (2) count(s) 1-6 FILING FEE $ (IFP-CJA) (Appeal rec'd 6/8/01) (c/s) (ko) [Entry date 06/13/01]

DATE	NO.	PROCEEDINGS
6/13/01	—	Notice of appeal and certified copy of docket as to David B. Pasquantino, Carl J. Pasquantino to USCA: [116-1) appeal, [115-1] appeal (c/s) (ko) [Entry date 06/13/01]
6/13/01	117	JUDGMENT Arthur Hilts (7) count (s) 1. Imprisonment 21 months. Supervised Release 2 years. Special Assessment $100.00 (Signed by Chf Judge J. F. Motz 6/13/01) (c/m & mircrofilmed 6/14/01) (eg) [Entry date 06/14/01]
6/15/01	118	NOTICE OF APPEAL by Arthur Hilts (7) count (s) 1 FILING FEE $ (IFP-CJA) (c/s) (ko) [Entry date 06/15/01]
6/15/01	—	Notice of appeal and certified copy of docket as to Arthur Hilts to USCA: [118-1) appeal (c/s) (ko) [Entry date 06/15/01]
6/26/01	—	USCA Case Number as to Arthur Hilts Re: [118-1] appeal USCA Number: 01-4465 (Case Manager: Lisa Jernigan) (ko) [Entry date 06/26/01]
6/26/01	—	USCA Case Number as to Carl J. Pasquantino Re: [116-1] appeal USCA Number: 01-4464 (Case Manager: Lisa Jernigan) (ko) [Entry date 06/26/01]
6/26/01	—	USCA Case Number as to David B. Pasquantino Re: [115-1] appeal USCA Number: 01-4463 (Case Manager: Lisa Jernigan) (ko) [Entry date 06/26/01]

DATE	NO.	PROCEEDINGS
6/26/01	119	ORDER of the USCA appointing Jensen E. Barber, II of Washington, DC as counsel pursuant to the provisions of the Criminal Justice Act to David B. Pasquantino (c/s) (ko) [Entry date 06/26/01]
6/26/01	120	ORDER of the USCA appointing Michael J. McCarthy of Bowie, MD as counsel pursuant to the provisions of the Criminal Justice Act to Carl J. Pasquantino (c/s) (ko) [Entry date 06/26/01]
6/26/01	121	ORDER of the USCA appointing Isaac Joe, Jr. of Baltimore, MD as counsel pursuant to provisions of the Criminal Justice Act to Arthur Hilts (c/s) (ko) [Entry date 06/26/01]
6/26/01	122	ORDER of the USCA consolidating USCA#01-4463, 01-4464 and 01-4465 for purposes of briefing and oral argument as to David B. Pasquantino, Carl J. Pasquantino, Arthur Hilts (c/s) (ko) [Entry date 06/26/01]
7/18/01	123	TRANSCRIPT of Motions Hearing filed as to David B. Pasquantino, Carl J. Pasquantino, Arthur Hilts for dates of 9/7/00 Re: [118-1] appeal, [116-1] appeal, [115-1] appeal (FILED SEPARATELY) (ko) [Entry date 07/18/01]
[Illegible]	124	TRANSCRIPT filed as to David B. Pas[illegible]uantino, Carl J. Pasquantino, Arthur Hilts for dates of 2/6/01 Re: [118-1] appeal, [116-1] appeal, [115-1] appeal (FILED SEPARATELY) (ko) [Entry date 07/18/01]

DATE	NO.	PROCEEDINGS
7/18/01	125	TRANSCRIPT filed as to David B. Pasquantino, Carl J. Pasquantino, Arthur Hilts for dates of 2/7/01 Re: [118-1] appeal, [116-1] appeal, [115-1] appeal (FILED SEPARATELY) (ko) [Entry date 07/18/01]
7/18/01	126	TRANSCRIPT filed as to David B. Pasquantino, Carl J. Pasquantino, Arthur Hilts for dates of 2/8/01 Re: [118-1] appeal, [116-1] appeal, [115-1] appeal (FILED SEPARATELY) (ko) [Entry date 07/18/01]
7/18/01	127	TRANSCRIPT filed as to David B. Pasquantino, Carl J. Pasquantino, Arthur Hilts for dates of 2/12/01 Re: [118-1] appeal, [116-1] appeal, [115-1] appeal (FILED SEPARATELY) (ko) [Entry date 07/18/01]
7/18/01	128	TRANSCRIPT of Sentencing filed as to Arthur Hilts for dates of 6/8/01 Re: [118-1] appeal (FILED SEPARATELY) (ko) [Entry date 07/18/01]
7/18/01	129	TRANSCRIPT of Sentencing filed as to David B. Pasquantino, Carl J. Pasquantino for dates of 6/8/01 Re: [116-1] appeal, appeal (FILED SEPARATELY) (ko) [Entry date 07/18/01]
7/18/01	—	Probation jurisdiction transferred out as to Francis A. Gillotti. Transmitted to Western District of New York Transfer of Jurisdiction form, with certified copies of indictment, judgment and docket sheet. (c/s) (rec'd 7/13/01) (eg) [Entry date 07/20/01]

DATE	NO.	PROCEEDINGS
7/30/01	130	TRANSCRIPT filed as to David B. Pasquantino, Carl J. Pasquantino, Arthur Hilts for dates of 2/13/01 Re: [118-1] appeal, [116-1] appeal, [115-1] appeal (Court Reporter: Lisa Bankins) (FILED SEPARATELY) (ko) [Entry date 08/01/01]
8/8/01	131	CERTIFICATE OF CLERK certifying record is complete for appeal purposes for [118-1] appeal, [116-1] appeal, [115-1] appeal as to David B. Pasquantino, Carl J. Pasquantino, Arthur Hilts (c/m) (ko) [Entry date 08/08/01]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

CRIMINAL CASE NO. JFM-00-202

UNITED STATES OF AMERICA,

v.

DAVID B. PASQUANTINO, CARL J. PASQUANTINO,
ARTHUR HILTS, FRANCIS A. GILLOTTI,
GERARD T. CICCONE, COSMO D. CANDIDO.

Thursday, September 7, 2000
Baltimore, Maryland
(Motions Hearing)

Before: HONORABLE J. FREDERICK MOTZ, *Chief Judge*.

* * * *

THE COURT: All right. Thank you. Who wants to go first?

MR. BARBER: Your Honor, I will humbly leap into the breach here. With respect to, I guess other than, as Mr. Welsh says, other than the boilerplate motions that we filed, we did file one to dismiss the indictment.

THE COURT: That seems to me to be the real motion. Isn't it?

MR. BARBER: Yes, sir.

THE COURT: All the other motions are denied.

MR. BARBER: Gee, that was easy. With respect to the Motion to Dismiss the indictment, Your Honor, we, and I apologize, to the Court as well as to Mr. Welsh for getting this up so late. We provided a response this morning. But I just got Mr. [4] Welsh's in my office on Tuesday. So we've been burning the midnight oil to respond to it.

Basically, what we have here is we have Circuits who have decided differently. We have a split between the First and the Second.

We have a, I think on our side of the table, we have the Supreme Court and the McNally case. We have a new case that came out of the trial court in New York called the Attorney General of Canada v. R. J. Reynolds Tobacco Company, which was decided sometime in July, I think, of this year, June the 30th of this year, which I cited in my response and which I can provide the Court a copy, which I'll give to the clerk. This is also voluminous.

But basically, it talks about the, and it is a civil case. But nevertheless, it ends up dismissing an indictment for a rather large racketeering RICO indictment sought by the attorney general of Canada, alleging that defendants established a smuggling scheme to avoid the payment of Canadian taxes. And in doing so, this Court in New York also found that the revenue rule, which we cited in our initial filing with the Court and again talked about it in our response to the government, that the revenue rule is alive and well, and ergo, having said that to the Court, is basically without jurisdiction to go forward with it, as such because there was not a cognizable injury to a business or a property. So they dismissed the indictment.

[5] We argue also in the posture that this Court should also dismiss the indictment.

The government relies strongly on the Trapilo case out of the Second Circuit, which suggests that you don't have to

reach the revenue rule in order to determine whether or not the wire fraud statute has been violated. And we're saying that our case is inapposite to the facts in the Trapilo case for a number of reasons. But mostly the facts in the Trapilo case were that liquor was purchased in the United States; it was then shipped to warehouses, which were stored on an Indian reservation.

Then from the warehouses, the liquor was then moved into Canada, it was smuggled into Canada, where Customs tax and Canadian excise taxes were avoided. And then the Canadian dollars that were earned were brought back into the United States and used in exchange for American dollars, and then used to buy more liquor, which then the scheme perpetuated itself.

The fact of the matter is the Court does not have before it any injury or, basically, any involvement in the United States, whether it's currency transactions. The men that are charged here, the Court would find out, that they bought the liquor that was purchased here in Maryland, was bought at retail or maybe a small wholesale. All Maryland state taxes were paid. There simply was not any—there was no tax law broken. There was simply not any cognizable injury to any person or business or enterprise or government entity in the United States, which makes [6] it different from the Trapilo case, which makes it different, the Trapilo case, we would argue, if the Court even looks at it, was wrongly decided because, in deciding it, it relies on four cases in its rationale. All four cases set forth some injury, some cognizable injury to persons, places, or entities within the United States.

The government relies on Brewer, which is a case in the Fourth Circuit, long time Fourth Circuit, and Florida. And we're talking about Florida tax laws that were involved there.

So I'm saying that this Court, in order to reach this case, would have to, because of the way this case is charged as a

wire fraud indictment and a wire fraud violation which talks about defrauding, would have to look as an essential element of the offense, who is being defrauded. And if there is no cognizable victim—I'm not talking about success of the scheme, I'm just talking about if there is no cognizable victim, then there is no crime, at which point then we're talking about whether or not we can go forward based on subject matter jurisdiction.

It seems to me that—

THE COURT: What are the elements of wire, of wire fraud?

MR. BARBER: The wire fraud is a scheme—whoever, having devised or tending to devise any scheme or artifice to defraud or obtaining money or property by means of false or [7] fraudulent pretenses, representations or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce any writings, signals, signs, pictures, or sounds for the purpose of executing such scheme or artifice. That's basically it.

What we're arguing—and that's what the McNally case in the Supreme Court said, even though the McNally case had to do with a mail fraud. And the cases that have followed that and the cases that have looked at the wire fraud essentially look and say, if we can't find it in the wire fraud statute history, we'll look to the mail fraud because those things are so similar.

But basically, the Supreme Court, in McNally, sets forth what it talks about fraud. And it talks about the statutory meaning of fraud and what "defraud" means and the intent of the Congress. And the fact of the matter is, it still gets us back.

If you cannot devise a scheme which defrauds some entity which is cognizable within the United States, then the wire

fraud statute, or in the case of McNally, the mail fraud statute does not apply.

And I wanted to assure the Court, we have these gentlemen here. I spoke with the barrister in Ontario, who was kind enough to provide me with a copy, and which I'll give Mr. Welsh, I'm sure he has a copy, a copy of the indictment which has been filed in Canada, in which these men, in fact all of the [8] defendants, have been charged for two breaches of Canadian criminal law. One is for the failure to file excise tax and one is for the possession of unlawfully imported spirits.

Therefore, its not that these crimes, if, in fact, the Court were to find that, that there is not a venue to try this case. And the appropriate venue is Canada. And they recognize that, and so they've indicted these people.

The Court basically has before it—we're talking about two, now three cases. We're talking about the Trapilo case out of the Second Circuit. We're talking about the Boots case out of the First Circuit. And we're talking about the new case which is out of the Second Circuit, but it's at the trial court level, having to do with the revenue rule, how it applies or doesn't apply.

The government wants you to obviously look to the Trapilo case. We're asking you to look at Boots and we're asking you to look at the new case. And we're also asking you to take notice of the fact that there is a proper venue, that these men were charged by indictment—well, by information, they call it in Canada, with crimes. So it's not that they could not be prosecuted.

And finally, that the Supreme Court in McNally was very clear about what fraud and defraud means in dismissing an indictment of mail fraud on the very same grounds. And that case is still good law. So therefore, we're either going to have

a [9] split in the circuits, which this case itself might end up before the Supreme Court.

But we would urge the Court, and we're not expecting a ruling today, but we would urge the Court, if at all troubled, then revert to the rule of lenity and find in favor of the defendants and dismiss the indictment.

THE COURT: All right. Mr. McCarthy.

MR. MCCARTHY Yes. Could I just add a couple of things here, Your Honor?

THE COURT: Sure.

MR. MCCARTHY: I represent, Michael McCarthy representing Carl Pasquantino. I think it's important to note, to add to Mr. Barber's comments that the recent decision in the Second Circuit, which is the Canadian government suing R. J. Reynolds, in which R. J. Reynolds is actually accused of setting up dummy corporations to help the smuggling scheme, it's a shocking allegation and could have far reaching effects for a lot of stockholders of R. J. Reynolds.

That was a civil RICO matter, Your Honor. I think it's important for us, what we're charged with in this case is six counts in our indictment, six counts of wire fraud. And there is a seventh count on an individual, Mr. Ciccone, with a weapon. The first two counts of the indictment charge, allege that David Pasquantino made arrangements, and then Counts Three through Six allege that my client, Carl Pasquantino, made arrangements with, [10] actually those are all allegations, with one liquor store in Mt. Airy, BJ's Liquor.

Now, I think it's important to look into the genesis of how this case got here which, when I was appointed in this case and I read the indictment, that was my initial reaction. How did this case get here? What did these gentlemen do that violated the laws of the jurisdiction?

I think what happened, at least in the counts against my client, is that somebody began an investigation down here of violation of the liquor laws and somebody put pressure on the liquor store operators. And I obviously am not privy to discussions. But discussions had to be held probably in this building in the U.S. Attorney's office, what can we charge these gentlemen with?

And I'm not at this point, Your Honor, alleging entrapment. That's an overused term in our legal system. But I think they tailored what crime was going to be charged and then they went on with the investigation. And they had body wires, consensual recordings of five conversations with my client, which is the basis for the wire fraud charged in this case. And they have a cooperating individual recording the phone conversations. And then my client is subsequently indicted for six counts of wire fraud.

And I think it's important to note this is not a conspiracy. There's no conspiracy charged in this indictment. [11] It's six separate and distinct counts of wire fraud.

And I think that in light of the Boots decision, which Trapilo tries to differentiate, but I think that, with the recent decision in the civil RICO case out of the Second Circuit, I just don't see how that this Court can be—the allegation is that the gentleman bought the liquor at a retail price. Now, the violations that were committed in this jurisdiction were committed by the liquor stores because they were retailers and they weren't supposed to sell in the volume that they were selling in. And obviously, if the case goes to trial and these individuals are brought up and testify, counsel will be provided with the appropriate material to cross examine, to see if they've pled to any crimes, etc., or what kind of deals they were granted. They had a very substantial stake because their liquor licenses were on the line.

But to try to enforce, now that we know positively that the gentleman have an indictment pending in Canada, I don't understand how this Court can be asked to enforce Canadian excise and duties in the State of Maryland when—

THE COURT: That's not what I'm being asked to do, is it? It is, and again, I will have to take another look at McNally. But the activity that occurred here was the formulation of the scheme to defraud somebody. Now, whether or not that fraud was successful might, could have been successful in the merits of the fraud, sort of make me look at Canadian Customs [12] law, which might be forbidden. It may or may not be. But assume for a moment it is.

But the locus of the activity—and it seems to me it's against the interest of this state to have people engaging in schemes to defraud other people, whether or not, you know, whether or not there is a cognizable victim within the meaning of the law. The activity then, frankly, for one thing, I mean, at a very practical level, that kind of activity breeds other kind of conduct which is not good, for example. And again it's not, only one person's charged with it, but it's carrying firearms and things of that nature. That kind of activity conducted in this state, which is the formulation of the scheme, itself has ancillary effects because it is essentially conduct which is of the sort to be corrupting.

MR. MCCARTHY: Your Honor, assuming, of course—

THE COURT: This is assuming it's all true. But that's, of course we're there.

MR. MCCARTHY: And that may be a point that the Court, I can understand the Court's reasoning. I don't agree with it. But if you have an indictment, the sovereign has an indictment across the border and they're the persons who have been defrauded.

THE COURT: But that's the point. These are not easy issues.

MR. MCCARTHY: No. No.

[13] THE COURT: In thinking about this—assume that the Canadian sovereign, it has its own problems. Let's assume that somebody avoided their excise laws and they can indict for that. What happened here, regardless of that, if just, it is corrupting and then it has ancillary effects here and it stems from, in a way, exactly what—that's why I asked what the elements of the crime are. It is the formulation of the scheme which itself is the corrupting, its corrosive aspects to Maryland. And, in fact, it does, you know, in a very tangible way, results in somebody driving a car with a firearm in it, or a truck with a firearm in it.

MR. MCCARTHY: Well, a vehicle.

THE COURT: A vehicle.

MR. MCCARTHY: But you know, Judge, that's something you can find right down here on the corner. I don't know what the estimate is. My wife keeps telling me, just keep your hands on the wheel and don't look at somebody when they cut you off because I don't know how many of those vehicles have weapons in them any more.

THE COURT: And if people have a felony conviction, they're going to end up right here and we're going to stop doing anything else. But that's another issue. Trying the felon in possession cases.

MR. MCCARTHY: That's right. That is the lawyer's relief act, Your Honor.

[14] THE COURT: Well, on the criminal side except for serious federal felonies, on the civil side we might as well forget intellectual property cases, employment discrimination and civil rights violations and other things that this Court

exists for. But that's a whole another issue which I won't get into now.

MR. MCCARTHY: I just hope that, I realize that the court just had the civil RICO matter dropped on the Court. I hope that the Court will be able to digest that fully before—we would not expect or want the Court to say, I'm going to take a 20 minute recess, and rule.

THE COURT: But it might be that simple. It might just be I've got to make the call because a civil RICO does—that's a whole different thing. It was cited. I have not read it. I won't pretend that I have.

But there the victim is the one, there is the harm to the victim. Here the harm is to the community, to this District. I mean that would be the theory. I don't know. I'll find out from Mr. Welsh.

That is what, as I just think about this, that is why it is something different than the harm to the Canadian government, is the fact, the very act of scheming. The word I guess, the adjective that is perhaps best, it's not, it may be corrupting somewhere, but it's corrosive, it is corrosive to this community, is it not? Assuming that it occurred.

[15] MR. MCCARTHY: I would say, Your Honor, you may have individuals that were so inclined, these individuals in these liquor stores. I can't say whether—I mean, it seems to be a method, they're in business to sell liquor and they violate it by selling wholesale volumes, assuming the allegations are correct, for argument, they're selling wholesale amounts in violation of the liquor laws.

I mean, it's questionable whether they were willing participants or whether they were out there actively engaged in trying to find people to move—

THE COURT: That's a whole different question.

MR. MCCARTHY: I understand that. Perhaps I'm practicing for trial if the motions are denied, because this is the type of thing that certainly would be fully exposed to a jury down here. And I can see some lights going on in those jurors' heads as I picture them there saying, what is this case doing here? But that's for another time.

I have nothing more on that motion even though the Court—

THE COURT: Okay. If you have something else to say, I will reconsider. Go ahead. If I rule.

* * * *

THE COURT: Mr. Welsh.

MR. WELSH: Yes. On the Motion to Dismiss the indictment, as the Court has inferred, it sets forth a substantial amount of conduct in Maryland. Specifically, there's the pick up of over 39,000 cases of liquor over an almost two [17] year period, on numerous, separate trips by people in all sorts of vehicles. A case of liquor is six 1.75 liter plastic bottles. So you've got six times 40,000 bottles of liquor that are involved in the case.

There's a substantial amount of contact back and forth with seven different liquor stores in this matter.

McNally doesn't, I believe, help Your Honor in the decision you have to make today. McNally refers, as I recall the McNally decision, has to do with whether a scheme to defraud can be of honest and faithful services—

THE COURT: I think it is the question of language in context, out of context taking on a new meaning, because it is the good and faithful services context, which then talks about the government, it has to have a property interest in that context. And of course, then you take that language and put it in another context, the revenues, and say that doesn't mean

that if the government, if a government has a revenue interest as opposed to a property interest.

But frankly, sometimes the development of the law is reasonable. To the extent that one tries to play word games, in my view it's not reasonable. But I' will take another look at McNally before I make my ruling.

MR. WELSH: I don't believe it's going to help Your Honor one way or the other.

The fact that there's an indictment in Canada isn't [18] anything new. This probably, a half of the offenses that we prosecute in this courthouse, there's another sovereign that has a right to prosecute, also, since so many of the things—

THE COURT: Aren't you, in effect, just helping Canada out in enforcing its smuggling laws? If it's got an interest, why shouldn't it assert it or why shouldn't it be brought as a smuggling case? Do we have a reciprocal statute as a policy matter? That's the ancillary holding in Boots, I guess.

MR. WELSH: There was so much activity on the American side of the border in this case because you have the, all of the logistics that go into obtaining this quantity of liquor. Then in the State of New York, you have the warehousing of it and the parceling of it out into smaller quantities for smuggling across the border.

THE COURT: Is there a smuggling statute that could have been applied?

MR. WELSH: I'm not aware of a U.S.—

THE COURT: It would have to be smuggling into Canada?

MR. WELSH: Right. I'm not aware of an export statute that would apply, which would be from our viewpoint. I think it would have to be what they were charged with in Canada. That's importing, how they charge it, is importing it without paying the tax.

So that's not unusual. Counsel says that Trapilo is wrongfully decided because the four cases that it relies on do [19] not involve a foreign government as a victim. Well, then we can say that the Boots case is wrongly decided because it didn't rely on any case in which a foreign government was the victim.

The truth of the matter is, there are only three cases that have to do with whether the foreign government can be a victim. And they're the three that have been cited, Boots, Trapilo and the Northern District of New York case that I cited that followed Trapilo. They're the ~~only three~~ reported cases that have to do with a scheme to defraud in which a foreign government is a victim. So they're the cases that will control Your Honor's view of this matter.

Frankly, the District Court case that follows Trapilo doesn't really add any additional rationale. So it's Boots and Trapilo.

Interestingly enough, the Trapilo case focuses on the elements of the offense being a scheme to defraud another of money or property, and that being the essence of the offense. And that is, in fact, there are three elements of the offense of wire fraud and mail fraud. The first element is the existence of a scheme to defraud another on your property.

The second is the knowing entry by a defendant into that, with the requisite intent.

And the third is the use of the mails or the wires, depending on which statute it is.

And so as the Trapilo decision clearly stated on Page [20] 552, the intent to defraud does not hinge on whether or not the appellees were successful in violating Canadian revenue law, as Section 1341 publishes this scheme, punishes this scheme, not its success. It cites the Helmsley Second Circuit case. Consequently, now on 553, there is no obligation to

pass on the validity of Canadian revenue law and the common law revenue rule is not commonly implicated. That clearly is the superior analysis in this case.

In the Southern District of New York case that was cited this morning, that is a civil RICO case in which the government of Canada is seeking money damages because of the scheme to do the same thing that's charged in this case; that is to violate the Canadian tax and import tax laws. That differs completely from criminal indictment because the purpose of the civil action is to receive money based upon Canadian laws. And that's why the District Court in New York, which is in the Second Circuit and bound by the Trapilo case, says, in their decision, that the essence of this is to have the government of Canada receive its Customs duties of which it was deprived, and therefore we have to rely on their revenue rule and the indictment runs afoul of the common law revenue rule.

In Trapilo and in Boots, it's clear that the indictments there did not require there to be any loss to the victim. The elements of the offense do not include that. We believe the Trapilo case is much better decided. And we ask the [21] Court to follow the Trapilo decision.

* * * *

THE COURT: Okay. Well, I'm going to ask what the defendants have asked me not to do because I really don't think this is something, I don't think my judgment's going to be a lot [23] better by spending hours and hours agonizing and writing this out than it is going to be after I simply, frankly, just take another look at McNally and read this RICO case.

It seems to me it's an issue on which there's a split in the circuits. I've read the circuit cases. I've thought about this. I'm going to give you my opinion in just a few minutes. Thank you.

(Recess.)

THE COURT: Well, I have reviewed the cases and they have confirmed my view that the indictment should not be dismissed. I had, of course, read the two Circuit cases directly on point before the Boots case and Trapilo case, and I thought that the Trapilo case was better reasoned. And frankly, the only insight I have to add to its analysis is what I have mentioned today during my colloquy with counsel and which I really think is an important policy matter which should be borne in mind in construing the statute and thinking about these matters.

This prosecution is not brought solely, if at all, to protect the excise revenues of Canada. As I've indicated, the focus of the mail fraud and wire fraud scheme is upon the scheme, as Trapilo points out, the formation of it, and then carrying out the scheme, whether or not it's going to be [24] successful, and that the very formulation of that scheme can have corrosive effects in the jurisdiction in which that scheme is formulated and steps a taken to carry it out. Because it is by nature or can be, you're engaging, essentially, in conduct that has a potentially corrosive effect and has been criminalized for that very reason. And that conduct was carried on in this state.

So I believe that Trapilo was analytically better decided, and as a matter of policy, that is the only insight I have to add to it, to its holding.

I have reviewed the civil RICO case to which I have been referred and it actually is now printed, published in 103 F.Sup.2d at 134. And again, I'm certainly not criticizing Mr. Barber for this. The part that I'm going to quote from is not in the papers he handed to me. As I say, it's not that—it wasn't Mr. Barber, Mr. McCarthy handed to me—that he was trying to hide something from me because we all knew it was there in the discussion. Maybe it's there but I missed it; that although, in the discussion of Trapilo, the civil case goes on to distinguish it precisely on the grounds we were discussing before, in that I guess the district judge there really ques-

tioned whether Trapilo had been rightly decided and perhaps implicitly continuing the revenue rule, although recognizing arguably, and the Court didn't reach the issue, but construing or being bound by Trapilo, the Court distinguished it on the very ground that it has been discussed this morning.

And that is that in terms, to the extent that what Canada was alleging was lost tax revenues, then inquiry into the fact of damage would require precisely the passing on the [25] validity of Canadian revenue laws and their applicability that the revenue rule forbids. The citation to this distinction appears at 103 F. Supp. 2d at 143. And that's precisely what we don't have to do here because, as Trapilo pointed out, you don't have to worry about whether or not the scheme would have been successful.

McNally, if anything, it seems to me is helpful to the government because it may refer to the property interest of the government. What it really focuses upon is money or property interest as opposed to good and faithful services. Here, whether or not it would been successful, clearly the scheme involved the money, not good and faithful services.

So this is certainly a legitimate motion. I certainly understand and I've considered. And the fact that I am ruling upon this orally does not mean that I don't take it seriously. But I do think that, frankly, it's an issue in which there is a clear conflict in the circuits. To me it ends up not being a difficult question at all because I think Trapilo is better reasoned, as I say, particularly when you focus upon what it is, why it is that this jurisdiction would have an interest in preventing, in criminalizing and then enforcing the criminal law against the concocting of the scheme because that itself has potentially corrosive effects.

* * * *

So the motions are denied. We can go off the record and just talk about scheduling for a moment.

(Conclusion of Proceedings.)

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

CRIMINAL CASE NO. JFM-00-202

UNITED STATES OF AMERICA,

v.

DAVID B. PASQUANTINO, CARL J. PASQUANTINO,
ARTHUR HILTS,

Defendants.

VOLUME II OF V
Wednesday, February 7, 2001
Baltimore, Maryland

Before: HONORABLE J. FREDERICK MOTZ, *Chief Judge* and a jury.

[Testimony of Francis Gillotti]

Q These were not the only occasions that you went into Canada?
A That's correct.
Q In fact, you went into Canada quite often, correct?
A That's correct.
Q But Canada is right next door to the town that you live in, correct?
A That's correct.
Q And Canada, across the border, has restaurants. You went to restaurants over there?
A Yes.
Q It had the casino. You went to casinos over there?
A There is a casino over there, yes.

Q You testified that you were involved with horses. And there are horse tracks over on the Canadian side of the border, correct?

A I was involved with moving a horse of Mr. Dave Pasquantino's at a farm, a horse farm in Canada.

Q And did you go into Canada to shop?

A Occasionally, but not that often.

Q But a number of people who lived in your town would go into Canada to shop, is that correct?

A Oh, correct.

Q And the reason for that is because of the exchange rate?

[134] A I believe so.

Q It was cheaper to buy food and clothes and go to restaurants and things like that in Canada than it was where you lived, correct?

A I'm assuming so, with certain things.

Q So its not an uncommon occurrence for residents of your town to go into Canada several times a day, is that correct?

A I would think not.

Q And in fact, you could actually walk across the border, correct?

A That's correct.

Q I have no further questions.

THE COURT: Anything further? Thank you, Mr. Gillotti. That's it? That's all. Thanks.

MR. WELSH: Next witness will be Gina Jonah.

OFFICER GINA JONAH,
GOVERNMENT WITNESS, SWORN

THE WITNESS: Yes, I do.

THE CLERK: Please be seated. Please speak directly into the microphone. State your full name for the record and spell your last name, please.

THE WITNESS: My name is Gina Marie Jonah. My last name is J-O-N-A-H.

THE CLERK: Thank you.

DIRECT EXAMINATION

BY MR. WELSH:

[135] Q How are you employed, Ms. Jonah?

A I am employed through Canada Customs, the Intelligence Division,

Q And what is your position called?

A I'm an intelligence officer.

Q How long have you been employed with Canada Customs?

A Seventeen years.

Q Are you familiar with the rules and regulations that pertain to the importation into Canada of alcoholic beverages?

A Yes, I am.

Q And would you describe for the Court and the jury what, if any, taxes or duties are due and owing on alcohol that is imported from the United States into Canada?

A Alcohol is taxed very high in Canada. There is an excise tax, that is a federal tax, that is applied, depending on the value of it, the U.S. purchase price. There is a general sales tax that is also a federal tax. There is a liquor Control Board of Ontario tax. And there also is a provincial sales tax.

Q Now, in this case, in preparation for your testimony, did you calculate the taxes that would be due and owing on a case of alcohol that was purchased in the United States for $56 American?

A Yes, I did.

Q All right. And would you give us the results of your calculation? What taxes would be due and owing if that same [136] case of alcohol were taken Into Canada?

A $157.

Q Now, is that American or Canadian?

A That is Canadian.

Q So that would be somewhat less than that in American, is that correct?

A Yes. That's correct.

Q Somewhere around $100?

A Correct. Yes.

Q Depending on the exchange rate at the moment, right?

A That's right. And the purchase price of the alcohol at the moment.

Q So is it fair to say roughly the amount of tax is twice the value of the case of liquor?

A Yes, it is.

Q Now, you were assigned to assist in the investigation of this matter and related investigation in Canada, is that correct?

A That's correct.

Q And would you describe for us what, if any, official actions you took with information systems pertaining to vehicles entering Canada?

A I issued lookouts for certain individuals that were suspected of smuggling alcohol into Canada. I also, we have a data base that enables us to track plates entering Canada. When [137] everyone enters Canada, a picture is taken of their license plate. And this data base is very helpful for us and assists us in the investigations.

Q And is the system that captures the information about the license plates on the vehicle entering referred to by the acronym of ICES?

A ICES works in a two part system with PALS. It's called the Primary Automated Lookout System. ICES is the system I enter the lookout into to tell the officers at a bridge who they send over for an examination,

Q Now, when you say send over for an examination, is there both a primary and a secondary area at the port?

A Yes, there is.

Q Would you briefly describe the functions of the Customs officers in those areas?

A The Primary Inspection Line we refer to as the PIL. That is where the officer asks you where you live, what is your citizenship, and goods that you have entering Canada. That officer will make a decision whether to refer you if there's a lookout on you, or if they feel they want to have the vehicle examined, they will send you over. And the vehicle will be examined in a secondary area by another inspector.

Q Now, do you have before you Government's Exhibit 37?

A Yes, I do. Yes, I do.

Q And just briefly tell us what Exhibit 37 is, please. [138] A 37 is a lookout that ! entered into one of our automated data bases, instructing the officers at the bridges to send a vehicle in for an examination.

Q Are the documents that are contained in Government's Exhibit 37 documents that are created and maintained in the ordinary course of business by the Canada Customs authorities?

A Yes, they are.

Q And specifically, were these documents created and maintained in response to your placing lookouts on certain vehicles?

A Yes.

Q Now, which vehicle does this exhibit relate to?

A This, the license plate, would you like?

Q Yes.

A NF2080.

Q And who is the registered owner of those—is that a New York or Ontario tag?

A I'm sorry. That's a New York tag, New York license plate.

Q And who is the registered owner of that tag?

A That tag is registered to Gina Pasquantino.

Q And would you just describe for us what is reported in Exhibit 37?

A You want the narrative that I've instructed the port officers?

Q Yes, please. Actually, I want what the port officers told [139] you happened.

A Okay. What happened is that this vehicle arrived—

MR. MCCARTHY: Objection, Your Honor.

THE COURT: Hearsay?

MR. MCCARTHY: Yes.

THE COURT: Overruled.

MR. WELSH: You may continue.

THE COURT: Government record.

THE WITNESS: This vehicle arrived in Canada and the primary officer asked all the questions and was instructing them like I instructed the lookout, and asked the vehicle to be pulled over for examination. The vehicle was directed into the secondary area and it took off. It just sped up the highway. I was paged immediately. And the officer completed a Port Runner Report, which is also attached here with a copy of her report of the questioning that took place when she interviewed the driver on the primary line.

BY MR. WELSH:

Q Was the driver ever identified by the port officer?

A No. The driver was not.

Q Now, did you have occasion to see this vehicle shortly after this event?

A Yes, I did.

Q When did you see the vehicle?

[140] A It was several days later, when it was found in Canada.

Q And where was it when you saw it?

A In Hamilton.

Q Court's indulgence, Your Honor. Like to next direct your attention to November the 25th of 1999. Did you have occasion to learn of another port run on the vehicle that you had placed a lookout upon?

A Yes, I did.

Q And do you have before you Government's Exhibit 38?

A Yes, I do.

Q And which vehicle, which tag number does this lookout and report relate to?

A W756LM, New York tag.

Q New York tag. And who is the registered owner of those tags?

A Francis Gillotti.

Q And would you describe what was reported as occurring on November the 25th of 1999?

A I had placed a lookout in the system on Francis Gillotti's vehicle, instructing the officers to pull it over and examine the vehicle. When he arrived, he was, the officer questioned him and referred him to the secondary examination area for an exam. And he left the area. He took off. He would not pull into the secondary area.

Q Now, if I can direct your attention on to December the 11th [141] of 1999. Did you have occasion to learn of yet another incident where a vehicle upon which you had placed a lookout ran the port?

A Yes, I did.

Q And do you have before you Government's Exhibit 21?

A Yes, I do.

Q And what tag number does that report relate to?

A V373WP, New York.

Q Who is the registered owner of those tags?

A The registered owner is David Pasquantino.

Q And would you describe what happened as reported on that date?

A A lookout was issued on this vehicle and the officers were instructed to examine the vehicle. And the vehicle was sent over. And again, the vehicle was, it ran the port. It took off.

Q Was any information obtained about who was operating that vehicle?

A Yes. An individual by the name of James Budwey was operating the vehicle at the time that it entered Canada.

Q And how was that determined?

A It was determined because as soon as the vehicle ran the port, the officer paged me immediately and he called U.S. customs and gave U.S. customs the information. And the individual spoke through the aid of a voice box. About two [142] hours later, U.S. customs called us and told us that they had the individual there but he was driving another vehicle when he entered the United States. So U.S. customs was able to provide us with information that he had in the vehicle at the time.

Q Now, I'd like to direct your attention to March the 31st of 2000. Did you have occasion to learn about a run of the port on that date?

A March the 31st.

Q Of 2000?

THE COURT: Do you have an exhibit number?

MR. WELSH: Yes. I need to get Pages 25 and 26 of Exhibit 19, please.

MR. MCCARTHY: Which pages again?

MR. WELSH: 25 and 26 of Exhibit 19.

THE WITNESS: Thank you.

BY MR. WELSH:

Q Do you recognize those documents, ma'am?

A Yes, I do.

Q And what are they?

A This is a copy of a Customs seizure receipt. When we seize goods and a vehicle at one of our bridges, a port of entry in Canada, we issue someone a customs seizure receipt when they pay to get their vehicle back.

Q Actually, this was not a run of the port but this was a recovery of evidence at the secondary location, is that correct?

[143] A Yes, it was.

Q All right. Would you describe what was reported happened on that occasion?

A I issued a lookout into our automated system and asked to have this subject pulled over to have his vehicle examined. And he pulled down into the secondary area and the officers found 24 bottles of alcohol hidden in the wheel well area of the vehicle.

Q Was the individual identified?

A Yes, he was.

Q And who was it?

A It was Cosmo Candido.

Q And the document that's before you is a report of that seizure, is that correct?

A Yes, it is.

Q At the time of the seizure, is the individual from whom the items were seized given any sort of paperwork?

A They're given a copy of this Customs seizure receipt.

Q And so Pages 25 and 26 there are something that would have been given to the driver at the time of the seizure?

A That's correct. He's paid the monies that were owed for his seized vehicle and he's free to leave there.

Q Now, do you have with you a number of printouts from the system relating to the information about various tag numbers coming across the border?

A Yes, I do.

[144] Q Why don't we start with the first exhibit number that you have in front of you? If you would just tell us which number that is?

A It is Exhibit 39.

Q All right. And what is the tag number for that vehicle?

A W442 Lima Kilo. K—

Q And who—

A New York.

Q And who is the registered owner of those tags?

A David Pasquantino. I believe that was on his van.

Q And would you just tell us approximately how many entries there are there.

A You want me to count each individual one?

Q Would you do that for us on this one?

THE COURT: I probably missed it. What's the time frame?

Q Going to get to that.

A I've counted 51.

Q All right. Would you give us the date of the first entry and the date of the last entry that's contained on the report?

MR. MCCARTHY: Exc4sed me. I missed that number.

THE COURT: 51.

THE WITNESS: 51. The. date of the first I have is 1998, December the 28th.

BY MR. WELSH:

[145] Q All right. And then the date of the last entry that's reported?

A April the 26th. 2000.

Q And at the top of the first page, does it indicate the period of time the records from which were searched? In other words, the time frame of the records that were searched.

A Yes. That's what indicates on the front, the time I was searching for, in that time frame.

Q And in this case, is that what's shown on the screen right now?

A Yes, it is.

Q And each of these reports have similar information that we're going to go over, is that correct?

A That's right.

Q There's a time range on the first page and then individual entries that were recorded, is that right?

A That's right.

Q Now, this information is being recorded in response to specific lookouts for tag numbers, is that right?

A This information is recorded on all vehicles that enter Canada. A picture is taken of the license plate at the time the officer is questioning them and it stays in our data bank.

Q So all vehicles that enter Canada, the tag numbers are recorded?

A That's correct.

[146] Q It doesn't necessarily tell you what vehicle the tag's on, is that correct?

A That's right.

Q All right. Would you tell us, go on to the next exhibit that you have before you. Tell us the exhibit number.

A The exhibit number is 41.

Q And the tag number for that vehicle?

A R672SE.

Q And who is the registered owner of those tags? A Cosmo Candido, his 1997 Intrepid, white.

Q And would you give us the, just the first and the last dates of the entries that were recorded?

A 1997, 07/09. 2000, 05/02.

Q Would you go on to the next exhibit, please?

A Exhibit Number 42.

Q The tag number for that?

A 12767AP.

Q And who is the registered owner of those tags?

A Carl Pasquantino's white pickup truck, Ford Ranger, I think it is.

Q And would you give us the dates of the first and last entry, please?

A The first date is 1998, 09/26. The last date is 2000, 05/03.

Q And would you go to the next one, please? [147] A Exhibit Number 43. The license plate is N[illegible]2080. It's registered to Gina Pasquantino. The first date is 1997, 03/29. And the last date is 1999, 07/16. Exhibit Number 44. W756LH, New York. That is Francis Gillotti's license plate. It's registered to him. First entry is 1998, 11/15. And the last is 1999, 11/25. Exhibit Number 45, BK678G. And that plate is James Budwey. First entry is 1999, 12/18. Last entry is 2000, 04/03. Exhibit Number 46, license plate V373WP. And that plate is registered to David Pasquantino. First entry is 1998, 07/25. 1999, 12/11 was last. Exhibit Number 47. V468 Whiskey Romeo, R. And this plate, I believe, is registered to—let me see. Gerald Ciccone. First entry is 1998, 08/01. Okay. Last entry is 2000, 05/01. Last one. Exhibit Number 48. 11782AP. That is registered to Hilts, Arthur Hilts. First entry 1998, 08/01. Last entry, 1999, 07/27.

Q And that completes all of the printouts that you have, correct?

A That's correct.

Q I want to return for just a moment to Exhibit 39, the second page.

A Okay.

Q And there is a column that's entitled Work Location. The [148] first entry there says Fort Erie Peace Bridge Traffic/BUS and 4104. Could you just explain to us in general what that entry means?

A Basically that is the Peace Bridge, when the person comes in at the Peace Bridge and a license plate, the picture is taken of the plate, that's what registers is Fort Erie Peace Bridge traffic and bus.

Q And within the first four entries, we have three different bridges, is that right? Both the Peace Bridge, the Queenston Bridge and the Rainbow Bridge, is that correct?

A That's correct.

Q I have no further questions.

MR. BARBER: Court's indulgence.

CROSS EXAMINATION

BY MR. MCCARTHY:

Q Good afternoon.

A Good afternoon.

Q Now, what is a, what's a Cam, a Cam pass?

A A CANPASS.

Q Cam, C-A-M. I'm sorry. Cam pass?

A Oh, we have a program called CANPASS in Canada. C-A-N-P-A-S-S. Is that what you're referring to?

Q Yes. I'm sorry.

A CANPASS is a privilege that we extend to certain people allowing them to enter Canada. Our organization conducts [149] several data base checks and has proven that you are a low risk traveler into Canada and you are given a CANPASS. And you are to cross at a certain location with that privilege.

Q Do you know if Carl Pasquantino had a CANPASS?

A I searched the system a few times and he did not. He might have obtained one at a later date. I'm not aware of that.

Q When was the last time you did a search for a CANPASS for Mr. Pasquantino, Carl?

A 19, 1999, January.

Q Court's indulgence.

A As I recall.

Q Nothing else.

THE COURT: Anybody else?

CROSS EXAMINATION

BY MR. JOE:

Q Yes, Your Honor. Just a few questions. Good afternoon, ma'am.

A Good afternoon.

Q My name is Isaac Joe and I represent Arthur Hilts. He's one of the individuals who you referred to as owning, one of the vehicles that crossed into Canada. I refer you specifically to Exhibit Number 48.

A Okay. I know it's here somewhere.

THE COURT: The last one. If that will help.

A Yes. It's right here. Yes.

[150] Q Now, you have indicated that the vehicle that this refers to, whose license plate number is 11782AP, was registered to Mr. Hilts, is that correct?

A Yes.

Q Now, it's true, isn't it, that all this document, that is Exhibit Number 48, reflects that that particular vehicle entered Canada on the day in question. That's correct, isn't it?

A The license plate entered Canada.

Q The license plate?

A Yes, that's correct.

Q And you have no way of knowing the purpose for the vehicle that contained the, on which the license plate was placed in the purpose of visiting Canada? You don't know anything about that, do you?

A No, I don't.

Q So you don't know whether or not the trips that are reflected on this particular exhibit were for recreational purposes or any other, any other kind of purposes?

A No, I do not.

Q Now, did you ever issue a lookout for this particular vehicle or the vehicle on which this license plate was placed?

A No, I did not.

Q Did you ever seize any vehicle, you or the Canadian authorities, seize any vehicle that Arthur Hilts had driven into Canada?

[151] A In Canada?

Q Yes. Into Canada?

A No.

Q And insofar as you are aware, no vehicle belonging to Arthur Hilts had been seized or was ever seized in Canada, is that correct?

A I cannot tell you that one was never seized. During the project that I was working on, one was not seized.

Q Thank you very much.

THE COURT: Do you want to ask another question? Go ahead.

MR. MCCARTHY: Yes.

CROSS EXAMINATION

BY MR. MCCARTHY:

Q May I approach?

THE COURT: Of course.

Q Ma'am, I want to show you what is marked as defendant Carl Pasquantino Exhibit Number One. Could you, could you identify that, please?

A Yes, I can. This is a renewal for a CANPASS designated commuter lane.

Q A renewal designated what?

A Designated commuter lane.

Q I see. And you wouldn't have a renewal form if you didn't previously have a CANPASS, would you?

[152] A No, that's right. That's correct.

Q And whose name is that in?

A This is in Carl Pasquantino's name.

Q And what's the date?

A The date is September the 30th.

Q Of?
A 2000.
Q And how long is a CANPASS usually good for?
A I don't, I don't know. I'm not sure. It could be nine months. I can't really say.
Q Could be a year? Two years?
A I don't think it's two years. I don't know. I don't work with the program, so I can't really say.
Q All right. That's an application for renewal of a CANPASS dated 9/30/2000 in the name of Carl Pasquantino, is that right?
A That's correct.
Q And is there a vehicle identified there?
A Yes, it is.
Q What's that?
A 12767AP.
Q And that's the same—
A It's a white pickup truck Ford Ranger.
Q Which is the same one that you listed on Government's Exhibit 42, which was the white truck, is that correct?
A That's right.
[153] Q And you say that those CANPASSes are issued to low risk travelers, is that right?
A That's correct.
Q Nothing else.

THE COURT: Mr. Barber?

CROSS EXAMINATION

BY MR. BARBER:

Q I think I may have my papers all messed up. Ma'am, if I could ask you to look at Government's Exhibit Number 39, which I think is your ICES
A Yes.
Q —run on Mr. Pasquantino. I'm going to put this up.

THE COURT: This is Mr. David Pasquantino.

Q Yes, ma'am—sir. Yes. This is the record that you identified as your ICES run on Mr. David Pasquantino.
A That's correct.
Q Okay. Now, in looking at all these columns on here, it tells you, let's see, goes, let's start from the work location. That big center column there?
A Yes.
Q The next one is the user ID. What does that mean, user ID?
A That is the name, that is the initials of the officer who was working the primary inspection line that spoke to the person that was in the vehicle.
Q Okay. And then I assume the next is the lane, which is [154] what lane of traffic the vehicle entered Canada?
A That is correct.
Q The next one says referral type.
A Yes, that's right.
Q Does that mean the type of inspection that one encounters when going over the border?
A That's correct.
Q In other words, so the one, two, three, four entry for Mr. David Pasquantino on February the 8th, 1999—
A Right.
Q —over the Rainbow Bridge shows that he was asked to go for a secondary inspection?
A That's right.
Q And in a secondary inspection, that's when you're asked to open up your trunks or your—
A Yes. You're asked to pull your vehicle over and the officer will search your vehicle.
Q And in looking at Number 39, Exhibit 39, was there any place that would suggest that Mr. Pasquantino, subject to a secondary inspection or otherwise, ever was found to have contraband?
A From looking at this?

Q Yeah.

A No. Not from looking at this.

Q Okay. But you can look at this and tell us, for example, [155] let's look at the last page here. I don't know what this, it says referral type and it gives an R. What does that mean?

A That means random. Do you want me to explain that?

Q I assume that just means it's your turn, right?

A No. Well, basically, the system is generated to every so many times a vehicle enters, it will instruct the officer to send it over for an exam on a random examination.

Q So in other words, when you say random, you mean the system generates the number of times?

A That's correct.

Q You wouldn't say, check this every 50 times?

A No, the system tells the officer when to do it.

Q So Mr. Pasquantino was also sent over on that page, it shows, another asks for a secondary. On that very same page.

A That s correct.

Q And the M just means?

A Mandatory.

Q Mandatory. Okay. Now, let's look at Number 43, Exhibit 43.

A Okay.

Q Which I believe you testified that vehicle or at least that license plate belonged to Gina Pasquantino.

A From my recollection, it did.

Q Okay. And just looking through that, you'll notice that there were a number of times that this car was selected for a [156] secondary?

A Well, I've gotten pages. I only have to send over twice for a secondary.

Q You may be right. And an R for random, there there's an occasional R?

A That's correct.

Q In other words, it was checked a couple of times?

A That's right.

Q And the other, which was Mr. David Pasquantino, which I do not know the exhibit number.

A That the pickup truck?

Q I don't know.

A 127. It's Exhibit Number 42?

MR. MCCARTHY: No, it was Carl. 42 was Carl. 39.

BY MR. BARBER:

Q No, Number 46.

A Okay.

Q I totally lost. Number 46?

A Yes.

Q In looking at that, that also, you testified that that belonged to Mr. David Pasquantino?

A The plate was registered to him, yes.

Q Okay. And that, that vehicle also entered into Canada a number of times and was at least sent over for a mandatory or a random search on a number of occasions?

[157] A That's correct.

Q And is there any document that you have or that your system would provide that could tell us what, if anything, was discovered as a result of these searches?

A No.

Q So in other words, you, from your system, you have no idea whether any time that Mr. Pasquantino drove over the border that he had alcohol?

A No.

Q Thank you.

THE COURT: Does anybody have any other questions?

MR. JOE: Your Honor, may I ask one other question?

THE COURT: Sure.

CROSS EXAMINATION

BY MR. JOE:

Q Referring your attention to Exhibit Number 48, which refers to the vehicle owned by Mr. Hilts. Can you identify the kind of vehicle that that plate was on?

A I don't recall at the moment, no. I don't.

Q Would it have been a '77 pickup truck?

A I don't know. Plates are transferrable. They go from one to another. I don't recall.

Q Do you have any information as to the kind of vehicle Mr. Hilts owned?

A The only thing—well, 117 I know was the license plate. [158] But at the moment, I can't recall what it was supposed to be attached to.

Q Thank you.

THE COURT: I don't want to confuse things. But I am a little confused. I would assume that you would have a data base that you could search to find out about seizures.

THE WITNESS: Yes, we do. I don't have any of that.

THE COURT: This is just that they re not here.

THE WITNESS: That's correct.

THE COURT: So that if any of those searches—and presumably you searched them?

THE WITNESS: That's right.

THE COURT: If any of those searches had resulted in seizures, your data base would show it.

THE WITNESS: That's right.

REDIRECT EXAMINATION

BY MR. WELSH:

Q I wanted to ask you a follow-up question about the CANPASS. You mentioned that that's for a designated commuter lane?

A That's correct.

Q Are the vehicles that go through the designated commuter lane treated the same as other vehicles in that the license plate numbers are photographed and recorded?

A That's right. Go ahead.

Q Is there a qualification to that answer?

[159] A No. They're the same, A photo is taken of them. The CANPASS program, however, checks are conducted on the individual. And if we have no previous enforcement, which means if we didn't do a seizure or if there was no criminal charges on the person that we have, we have to give them a CANPASS. There's people we suspect—

MR. MCCARTHY: Objection, Your Honor.

MR. WELSH: I don't think the witness needs to answer any farther.

THE COURT: All right. Okay,

MR. WELSH: So I have no further questions.

THE COURT: I'll strike what was just said.

MR. WELSH: That's all.

THE COURT: Anything further?

MR. WELSH: No, Your Honor.

THE COURT: Thank you very much. Any other people down from Canada you want to try to get on today?

MR. WELSH: I have the next witness who I'm ready to put on. I'm not sure that we would finish with her today. And they're all going back tomorrow, anyway.

THE COURT: We did get a little, today was not as productive as it could have been. But we're still moving at a good pace, I gather.

MR. WELSH: We are.

THE COURT: Why don't we stop? See everybody at 9:30.

[160] Have a nice evening.

(Conclusion of Proceedings.)

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

Criminal No. JFM-00-0202

UNITED STATES OF AMERICA,

v.

DAVID PASQUANTINO, CARL PASQUANTINO, ARTHUR HILTS,
Defendants.

Baltimore, Maryland
February 13, 2001
9:30 a.m.

TRANSCRIPT OF TRIAL
BEFORE THE HONORABLE J. FREDERICK MOTZ
UNITED STATES DISTRICT JUDGE, and a jury.

* * * *

[Judge Motz:]

Now I'm not going to read the indictment to you. You're going to have the indictment with you. Again, I remind you it's not evidence of any kind. But each count is what's called wire fraud. And in order to sustain a charge of wire fraud, the Government must prove each of the following elements beyond a reasonable doubt. First, that there was a scheme or artifice to defraud as the indictment alleges. Second, that each defendant or the defendant whose guilt or innocence you are considering knowingly and willfully participated in the scheme or artifice to defraud with knowledge of its fraudulent nature and with specific intent to defraud or that he

knowingly and intentionally aided and abetted others in this scheme. And third, that in the execution of the scheme, a defendant used or caused the use of interstate wires as specified in the indictment. They are the three elements.

Now the first element that the Government must prove beyond a reasonable doubt is that there was a scheme or artifice to defraud the governments of Canada and the province of Ontario of money. That's what the scheme alleged is. Now this first [22] element is almost self-explanatory. A scheme or artifice is merely a plan for the accomplishment of an object. A scheme to defraud is any plan, device or course of action to obtain money reasonably calculated to deceive persons of average prudence. Fraud is a general term which embraces all the various means by which human ingenuity can devise and which are resorted to by an individual to gain advantage over another by false representations, suggestions or suppressions of the truth or deliberate disregard for the truth. Thus, a scheme to defraud is merely a plan to deprive another of money by trick, deceit, deception or swindle. Now bear in mind that the trick under the law, the trick, deceit, deception or swindle must relate to a material matter and let me briefly describe material for you. A matter is material if a reasonable person would attach importance to its existence or nonexistence. The Government is not required to prove that the defendant himself originated the scheme to defraud. Furthermore, it is not necessary that the Government prove that the defendant actually realized any gain from the scheme or that the intended victim actually suffered any loss. A scheme to defraud need not be shown by direct [23] evidence, but may be established by all of the facts and circumstances in the case.

A couple of other things about the first element. The indictment charging the defendants allege a number of different components of the scheme to defraud. These components are set forth in paragraphs 3 to 11 of Count I. To sustain its

burden of proof, the Government is not required to prove all the components of the scheme to defraud that are alleged in the indictment. If the Government proves the scheme to defraud that contains some or all of the components in the indictment but is simply more narrow than the scheme to defraud as defined in the indictment, then the Government has carried its burden of proof as to the existence of a scheme to defraud.

Now as I told you before, in determining whether a particular defendant was a member of a scheme, each defendant is entitled to have the evidence against him considered individually including evidence of his knowledge or lack of knowledge, evidence of his participation in key conversations and evidence of participation in the activities in execution of the criminal plan. You may not convict a defendant of the offense unless [24] you are satisfied beyond a reasonable doubt that the defendant is a participant in the scheme which is charged in the indictment. The Government must show that the single overall scheme charged in Count I actually existed. The Government must prove beyond a reasonable doubt that the specific scheme charged is the actual scheme which the defendants knowingly and deliberately joined. Proof of separate or independent schemes is not sufficient. In determining whether or not any specific alleged scheme has been shown by the evidence, you must consider whether common, master or overall goals or objectives existed, which served as the focal point for the efforts and actions of any members of the agreement. In arriving at this decision, you may consider the length of time the alleged scheme existed, the mutual dependence or assistance between various persons alleged to have been its members and the complexity of the goals and objectives shown. A single scheme may involve various people at different levels and may involve numerous transactions conducted over a period of time and various places. A single scheme is one in which the defendants and those with whom they are charged with

share a common goal of the scheme as set forth in [25] the indictment. Separate or independent schemes although they may have common elements, common participants, common means, some common objectives or other common factors, but which lack the critical element of common objectives of the scheme on the part of all of the participants do not qualify as a single scheme. A person who has no knowledge of a scheme, but who happens to act in a way which advances some goal of the scheme does not thereby become a member of the scheme. Unless the Government proves beyond a reasonable doubt that the scheme alleged in the indictment actually existed and that the defendant knowingly and intentionally entered into that specific scheme, then you must find the defendant not guilty. Now that was the first element.

The second element that the Government must prove beyond a reasonable doubt is that a defendant participated in the scheme to defraud knowingly, willfully and with specific intent to defraud. Knowingly means to act voluntarily and deliberately rather than mistakenly or inadvertently. Willfully means to act knowingly and purposely with an intent to do something the law forbids. That is to say with bad purpose either to disobey or to disregard [26] the law. Intent to defraud means to act knowingly and with a specific intent to deceive for the purpose of causing some financial loss to another and specifically the other in this case is the government of Canada and the province of Ontario Now the question of whether a person acted knowingly, willfully and with intent to defraud is a question of fact for you to determine like any other fact question. This question involves one's state of mind. Direct proof of knowledge and fraudulent intent is almost never available. It would be a rare case indeed where it could be shown that a person wrote or stated that as of a given time in the past, he committed an act with fraudulent intent. Such direct proof is not required. The ultimate facts of knowledge and intent, those subjectives may be established by circumstantial evidence based upon a

person's outward manifestations, his words, his conduct, his acts and all the surrounding circumstances disclosed by the evidence and the rational or logical inferences that can be drawn from them. Circumstantial evidence if believed is of no less value than direct evidence as I told you before. In either case, the essential elements of the crime must be established beyond a [27] reasonable doubt. Since an essential element of the crime charged is intent to defraud, that follows a good faith on the part of a defendant as a complete defense to a charge of wire fraud. A defendant however has no burden to establish the defense of good faith. The burden is on the Government to prove fraudulent intent and the consequent lack of good faith beyond a reasonable doubt. As a practical matter then, in order to sustain the charges of wire fraud, the Government must establish beyond a reasonable doubt that each defendant knew that his conduct as a participant in the scheme was calculated to deceive and nonetheless, he associated himself with the alleged fraudulent scheme for the purpose of causing some loss to the government of Canada and the province of Ontario.

A defendant's knowledge is a matter of inference from the facts proved. In that connection, I instruct you that to be a member of a scheme, a defendant need not have known the identities of each and every other member nor need he have been apprised of all of their activities. Moreover, a defendant need not have been fully informed as to all of the details or the scope of the scheme in order to justify an inference of [28] knowledge on his part. The extent of a defendant's participation in a scheme has no bearing on the issue of a defendant's guilt. A person's liability is not measured by the extent or duration of his participation. Indeed each person may perform separate and distinct acts and may perform them at different times. Some participants may play major roles while others may play minor roles in the scheme. An equal role is not what the law requires.

Excuse me. I'm going to digress for a moment. You may not however infer that a defendant is guilty of participating in criminal conduct merely from the fact that he was present at the time the crime was being committed and had knowledge that it was being committed. Likewise, you may not infer that any defendant was guilty of participating in criminal conduct merely from the fact that he associated with other persons who were guilty of wrongdoing. Now I said I was digressing. I wasn't digressing. I was just turning to another instruction.

Now to conclude on the second element. If you find that a defendant was not a knowing participant in the scheme and lacked the specific intent to deceive, you should acquit that defendant. [29] On the other hand, if you find the defendant has established beyond a reasonable doubt not only the first element, namely, the existence of a scheme to defraud, but also the second element, the defendant was a knowing participant and acted with specific intent to defraud and if the Government also established the third element as to which I'm about to instruct you, then you have a sufficient basis upon which to convict.

And, counsel, actually, I don't think anybody gave me a specific instruction on the third element which is you either had to use an interstate wire across state lines or else cause somebody else to use it in the execution of the scheme. So I meant to mention this to you. Is there one there? Let me have it. It just didn't find its way into my papers. Thank you.

The third and final element that the Government must establish beyond a reasonable doubt is the use of an interstate or a wire communication in furtherance of the scheme to defraud. The wire communication must pass between two or more states. As, for example, a telephone call between New York and Baltimore. Excuse me. Not Baltimore. Maryland. The use of the wires need not itself be a [30] fraudulent representation. It must, however, further assist in carrying out the scheme to defraud. It is not necessary for the defendant to be

directly or personally involved in the wire communication as long as the communication was reasonably foreseeable in the execution of the alleged scheme to defraud in which the defendant is accused of participating. In this regard, it is sufficient to establish this element of the crime if the evidence establishes a finding that defendant caused the wires to be used by others. This does not mean the defendant must specifically have authorized others to make the call. When one doesn't act with knowledge that the use of the wires will follow in the ordinary course of business or where such use of the wires can reasonably be foreseen even though not actually intended, then he causes the wires to be used.

With respect to the use of the wires, the Government must establish beyond a reasonable doubt the particular use charged in the indictment. However, the Government does not have to prove that the wires were used on the exact date charged. It is sufficient if the evidence establishes beyond a reasonable doubt that the wires were used on the [31] dates substantially similar to the dates charged.

So that's the three elements and now I'm going to—I've mentioned the concept of aiding and abetting. So now let me give you an instruction on aiding and abetting.

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND
NORTHERN DIVISION

CRIMINAL CASE NO. JFM-00-202

UNITED STATES OF AMERICA,

v.

DAVID B. PASQUANTINO, CARL J. PASQUANTINO,
Defendants.

Friday, June 8, 2001
Baltimore, Maryland
(Sentencing)

Before: HONORABLE J. FREDERICK MOTZ, *Chief Judge*.

* * * *

[3] THE COURT: Okay. Who wants to be heard? How do we want to address this issue? Mr. Welsh, do you want to?

MR. WELSH: Yes. Your Honor, our basic position was set forth in our original letter following the jury verdict of February the 16th to the Court, in which we set forth our calculation of the loss in this matter. And what we did is we added up the number of cases of liquor from the liquor stores involved. We applied a factor of 90% because there was testimony during the trial that 90% of the liquor that was picked up in Maryland was taken to Canada. And then I rounded off the conversion of the amount.

THE COURT: Before you go, I just realized, I was scheduling something else. I'm going to tell them to get another time. Wait a second.

(Pause.)

THE COURT: Go ahead.

MR. WELSH: Your Honor, we totaled up the number of [4] cases. We took 90% based on the testimony that Your Honor heard. And then I rounded down to $100 American the amount of taxes per case that you also heard testimony about. It came out to $105 or so rounding it off.

So the total loss of all, relating to all the cases comes to $3,589,200.

It's the government's position, based upon the evidence that Your Honor heard, that these two defendants were the organizers of this criminal activity and that all of that loss should be attributed equally to the two of them because they were responsible for that loss and/or it was all reasonably foreseeable to them.

So that, in essence, is our position. And it's based upon the testimony presented at trial.

THE COURT: All right. Mr. Barber.

MR. BARBER: Yes, sir. First of all, I would like to object to one of the statements that Mr. Welch made, which was 90% of the liquor purchased from all these liquor stores went to Canada. We did hear, basically, from every liquor store owner that testified before the Court that they estimated that 90% of the sales that they made were sold to somebody who had participated in the scheme. But there was not, nobody said 90% went to Canada. I mean, that's an inference that one may draw. But nevertheless.

* * * *

THE COURT: Thank you. Mr. McCarthy?

MR. MCCARTHY: Yes, Your Honor. Just briefly, Your [9] Honor.

I did file a sentencing memorandum and the Court will note in there that I just objected to the government's calculation as to the loss. When I had initially written Ms. Hall back in March, I had said, and my client was accepting responsibility. And I had included the amounts that were attributable to Mr. Gillotti, but now I believe, that's why I did not address that issue in my sentencing memorandum.

But the most important point in my sentencing memorandum that was filed on May 23rd was, if there can be no loss amount for restitution because it's a foreign government, I do not understand how we can have a loss amount to determine a base offense level. And therefore my objection would be that there should not be, they can't prove any loss amount. That's my basic position.

But then my client has assumed responsibility. And I think the agents at some point had marked various bottles, that they subsequently came from Maryland, even though my client never directly dealt with any of those stores. And we have to remember here, we aren't dealing with a conspiracy. But my client would assume responsibility.

I believe we went back and doublechecked that and had the agent, actually took a recess and went and doublechecked it. And I believe the amount that she came up with was, of the cases that were marked, 96.5 were recovered in Canada. It was 96.5 [10] cases multiplied by the factor that the government chose to use, $105 per case. That would be $10,132.50.

And then going to the guidelines, 2F1.1, more than $10,000 would be an add three.

So I think if you take the base offense level of six and you add three, you would have a base offense level of nine. And then I would suggest that for my client, Carl Pasquantino, minus two for acceptance of responsibility, which will be a seven. And with him having no prior criminal record, I

believe that would leave a sentencing guideline range of zero to six. And that would be my position.

Now, in my sentencing memorandum, if the Court were to—I had mentioned Apprendi numerous times because we don't know exactly where Apprendi's going to end up. And it's my position that anything that increases the potential sentence should have been submitted to the jury and therefore any bump ups would be inappropriate for more than minimal planning or anything else.

However, in particular, if the Court were to accept the government's calculation, that would have an offense level, I believe, of, according to the Presentence Report, of 25, which would have, and 25 on the sentencing grid with no record would be 57 to 71 months.

Now, the maximum punishment for this offense is 60 months. And therefore, even under Apprendi, the loss amount would clearly go beyond the statutory maximum. And therefore, [11] that should have been submitted to the jury due to the fact that it wasn't—

THE COURT: You're not suggesting that I could sentence above 60 months?

MR. BARBER: Well, all I'm suggesting is the sentencing guideline range leaves an exposure. I understand the Court's question that the max is, the max is 60 months. But I'm just saying, because of the—

THE COURT: Actually, actually it's the max. But there are different counts. They can be consecutive. I withdraw that question.

MR. MCCARTHY: That is correct. And that, also, is an important reason why the first two counts of that indictment were allegedly made by David Pasquantino from a certain number in New York. Counts Three, Four, Five and Six were allegedly made from Carl Pasquantino from a place

unbeknownst to anybody. And that's why, when we made our motion for a judgment of acquittal, the government did some quick shuffling and said, well, there's circumstantial evidence. There is no circumstantial evidence that those calls were made from New York. And that's a very relevant factor.

But as the Court can see, if the Court buys the government's theory, you could go beyond the amount of the statutory maximum and, therefore, that should have been submitted to the jury. And it's our position that under [12] Apprendi, any of the potential increases should not be applied in this case.

* * * *

* * * *

[14] THE COURT: Thank you. Mr. Welsh?

MR. WELSH: Yes. Your Honor, Mr. Barber's correct that I mischaracterized the 90%. And I agree with him that the record before Your Honor is that 90% of the cases of liquor on those schedules went to the individuals involved in this case.

There was testimony from Quaranta and Gillotti and then there was circumstantial evidence that that liquor was going into Canada. So just to be sure—

THE COURT: Sure.

MR. WELSH:—that my position as to what the record [15] reflects is clear.

THE COURT: I take it even if some of it didn't make it to Canada, you've got essentially a million dollars or a hundred thousand, a hundred thousand cases.

MR. WELSH: Yes.

THE COURT: You're talking about.

MR. WELSH: That's correct.

THE COURT: What I mean by that is that the level 13 begins at two million five. And under your calculations, the amount of loss is three million five.

MR. WELSH: Three million nine.

THE COURT: Three million nine. So it's more than—

MR. WELSH: More than halfway up in that range.

THE COURT: I wouldn't be surprised if some of it stopped off, I think we had evidence at some point that some may have been going—there were allegations that Mr. Hilts, I think, I forget what it was.

MR. WELSH: Yes. That will come up with Mr. Hilts. But what it was, it was a statement.

THE COURT: By somebody else.

MR. WELSH: By some informant to a Niagara County detective that somebody named Butch was selling liquor.

* * * *

MR. WELSH:

* * * *

Counsel referred to the Third Circuit case which states correctly the law, that if you can't with some reasonable degree of certainty affix the loss to the victim, then you look at the gain or intended gain to the defendant. But the government suggests that that's not the case here. We know exactly how much per case is the loss to the Canadian government and the Province of Ontario. And we know with reasonable [18] certainty the number of cases that were involved.

As the Court points out, there's plenty of room on either side of our number of cases, that still isn't going to change the level at which the loss is currently under the guidelines.

* * * *

On the Apprendi issue, the government cites the 7th Circuit case, two cases from the 7th Circuit that say that sentencing guideline factors are not within the ambit of the rule in Apprendi. And that makes sense because sentencing guideline factors cannot affect the statutory maximum penalty. And that's what Apprendi teaches, is that the statutory maximum penalty, whatever factors affect that have to be submitted to the jury and proven beyond a reasonable doubt. So here it does not matter.

The fact that the sentencing range in this case [20] exceeds the statutory maximum for a one count really doesn't matter because there are multiple counts of conviction. And so the

sentencing range of 57 to 71 months is well within the total statutory maximum of the offenses of which the defendants have been convicted.

* * * *

MR. MCCARTHY:

[W]e think that the only liquor, when you try to figure loss, if you think it's appropriate for any increase over the six base offense level, but I still don't understand how you can't have a loss for [24] restitution purposes because it's a foreign government but you can for guideline purposes. Of course, that goes to the basic jur-isdictional issue of what are we doing here anyway? This Court gave that matter some serious thought. I think perhaps it will be revisited at a later time.

* * * *

MR. BARBER: Your Honor, if I may. I would just like to ask that we be allowed to join in the arguments made by co-counsel.

THE COURT: Of course.

MR. BARBER: Thank you.

MR. MCCARTHY: And likewise.

THE COURT: I am not going to perhaps address every one of the arguments because, frankly, I don't think there's anything close to anything that's cognizable under the sentencing guidelines. I mean, I will hold my tongue as to the quality of the positions of the defendant. But they, as far as [25] the loss is concerned, I am fully satisfied from the evidence produced at trial that the loss is above two and a half million dollars.

The government's calculations, essentially, are correct based upon the evidence at trial. Somewhat less than the number of cases attributed by the government to the scheme may have reached Canada. But as I indicated in colloquy with

counsel before, there would be a tremendous number of cases that didn't reach there and still be above two and a half million dollars, as far as the level 13 is concerned.

The jurisdictional issue is in the case. It's legitimately in the case. It's legitimately pursued. And I assume it will be visited on appeal. But sentencing is not the time to revisit that.

In terms of materials that have been presented to me today concerning the credibility of some of the witnesses, these witnesses were thoroughly cross examined at trial. There were things I find, frankly, to be cumulative. And it doesn't affect my assessment of what the amount of loss was one iota.

This is no acceptance of responsibility at all. Certainly, the jurisdictional issue could have been preserved and a stipulated guilty plea entered into. Letters by counsel after the verdict saying "we accept responsibility to some degree or whatever degree it may be" is not the kind of acceptance of responsibility contemplated by the guidelines to [26] result in a reduction.

I am not unsympathetic to, I'm going to refuse to call 58 an advanced age, but to the age and the health of defendants, particularly Carl Pasquantino. But unfortunately, fortunately or unfortunately, these are not matters for me to consider under the guidelines. I don't mean to give short shrift to this, but frankly, there simply is no basis under the guidelines for the adjustments or the departures requested.

MR. WELSH: Your Honor, to clarify. Is the Court saying that the matters are not extraordinary to the extent that the Kuhn opinion applies?

THE COURT: Of course, under Kuhn you can consider. I'm talking about the quality, not—they are not there in the extraordinary degree that I would exercise my discretion to entertain any of the departures.

It's just nothing there. I don't know of any simpler way to put it.

All right. So we have guideline ranges of 57 to 71, is that right? In terms of role in the offense, clearly the evidence establishes the leadership roles in the offense. And the fact that Carl Pasquantino may have, was found by a Social Security ALJ to have a disability simply doesn't affect his role in this offense.

57 to 71. What's the government's position? Let's see. What's the government's position within that range?

[27] MR. WELSH: Your Honor, we'll submit to the Court's discretion.

THE COURT: I'd be glad to hear from counsel, but I will tell you before hearing from counsel, I will say that I would intend to sentence at the low end of the range. Do you want to say anything further, Mr. McCarthy? Mr. Barber?

MR. MCCARTHY: No, Your Honor.

MR. BARBER: No, Your Honor.

THE COURT: Mr. David Pasquantino, before I impose sentence upon you, I'd be glad to hear anything you have to say. You don't have to saying anything at all. I certainly wouldn't hold that against you. If there's anything you want to say, I'd be glad to hear from you.

DEFENDANT DAVID PASQUANTINO: Yes. I want to thank this Court for any considerations. I want to thank my attorney and his staff. And I do accept responsibility for everything that I was involved in with this case and what I was aware of.

I give no excuses, just an explanation. Looking around the courtroom, I can see just about everyone is between the age of 50 to 60 years old, but I don't think anyone besides myself has a one year old and a two year old. Your Honor, please take these boys into consideration. Thank you.

THE COURT: Thank you. Mr. Pasquantino, Mr. Carl Pasquantino, before I impose sentence upon you, I'd be glad to hear anything you have to say. As I say, I wouldn't hold it [28] against you if you didn't say anything. But I'd be glad to hear from you. It's entirely up to you.

DEFENDANT CARL PASQUANTINO: Your Honor, first, I've got to say I'm not responsible for all that was presented. But I will take responsibility for the actions that have led me here. I will accept your decision. I only ask that you consider my background and let me be, remain an active part of society, productive member of society. Thank you.

THE COURT: Thank you, Mr. Pasquantino.

Well, the sentences are going to be the same so I'll announce them the same. I will sentence each of you to the custody of the Attorney General for a period of 57 months. I will impose as to each count the hundred dollar assessment required by law. I will impose no fine. As I have indicated in other cases, I do not believe that restitution, I think the government agrees, is appropriate in this case.

I will place each of you on supervised release for a period of three years as to each count, to run concurrently with one another, with the special conditions of probation being that you provide the probation officer with access to any requested financial information—excuse me. In Mr. David Pasquantino's case, that you satisfactorily participate in a program approved by the probation officer for gambling addiction.

There's something I missed here. Maybe this is a separate issue that, before I impose this, I'd better explore.

UNITED STATES DEPARTMENT OF JUSTICE

[SEAL]

United States Attorney
District of Maryland
Northern Division

Stephen M. Schenning
United States Attorney

Gregory Welch
Assistant United States Attorney

6625 United States Courthouse
101 West Lombard Street
Baltimore, Maryland 21201-2692

410-209-4800
TTY/TDD:410-962-4462
410.209-4906
FAX 410-962-1124
Gregory.Welsh@usdoj.gov

February 16, 2001

The Honorable J. Frederick Motz
Chief United States District Judge
101 W. Lombard Street
Baltimore, Maryland 21201

Re: United States v. David B. Pasquantino, Carl J. Pasquantino and Arthur Hilts, a/k/a/ Butch.
Criminal No. JFM-00-0202

GOVERNMENT'S STATEMENT OF FACTS
AND APPLICABLE SENTENCING FACTORS

1. STATEMENT OF FACTS

During the period starting in about March 1997 and continuing through May 2000, brothers DAVID B. PASQUANTINO and CARL J. PASQUANTINO devised a scheme to purchase wholesale quantities of liquor in Maryland, transport that liquor to New York State, store it there, then smuggle it into Canada without paying Canadian and Ontario Provincial excise duties and taxes. Working sometimes alone and sometimes together, they would order large quantities of selected liquors by telephone from several different Maryland retailers. A typical order might include 100 to 400 total cases of two or three different kinds of liquor. A case consists of six 1.75 liter plastic bottles. The

PASQUANTINO brothers would arrange for a driver and a vehicle to travel from the Niagara Falls, New York, area where they lived to Maryland to pick up the liquor and transport it back to Niagara Falls. The liquor was taken to storage areas which were also used to stage the subsequent smuggling of the liquor into Canada without declaring the liquor or paying the duties and taxes. FRANCIS A. GILLOTTI, GERARD T. CICCONE, and ARTHUR HILTS a/k/a BUTCH participated in the scheme by occasionally driving to Maryland and transporting the liquor to New York.

On the dates specified in Counts One and Two of the Indictment, on March 9, 1999, and June 5, 1999, DAVID B. PASQUANTINO placed interstate telephone calls from his home in Niagara Falls, New York, to Valley Wine and Spirits in-Hagerstown, Maryland, in furtherance of the scheme to defraud. On September 20, Septcmber 28, October 2, and October 16, 1999, as specified in Counts Three through Six of the Indictment respectively, CARL J. PASQUANTINO placed interstate telephone calls from his home in Niagara Falls, New York to BJ's Liquors in Mt. Airy, Maryland, in furtherance of the scheme to defraud.

Testimony at trial established that at least 90 percent of the following quantities of cases of liquor were involved in the scheme to defraud: BJ's Liquors—8747; Central City Liquors —5439; Button's Liquors—4046; JRJ Liquors—5047; Thurmont Liquors—4725; Valley Wine and Spirits—11128; and Chocolate Park Tavern—748. Testimony at trial also established that the Canadian customs duties and excise taxes on a typical case of liquor is approximately $100 American.

2. SENTENCING FACTORS—DAVID B. PASQUANTINO

As one of the two organizers of the smuggling operation, DAVID B. PASQUANTINO is responsible under the Sentencing Guidelines for all of the cases of liquor set forth above, a total of 39,880. Applying a factor of 90 percent

results in 35,892 cases. The loss for guideline purposes is thus $3,589,200.

Under U.S.S.G. §§ 2Fl.1 and 3B1.1, the base offense level of 6 is increased by 13 levels due to the amount of loss involved, by 2 levels for more than minimal planning, and by 4
levels for role in the offerse, resulting in an adjusted offense level of 25.

3. SENTENCING FACTORS—CARL J. PASQUANTINO

As one of the two organizers of the smuggling operation, CARL J. PASQUANTINO is responsible under the Sentencing Guidelines for all of the cases of liquor set forth above, a total of 39,880. Applying a factor of 90 percent results in 35,892 cases. The loss for guideline purposes is thus $3,589,200.

Under U.S.S.G. §§ 2F.1 and 3B1.1, the base offense level of 6 is increased by 13 levels due to the amount of loss involved, by 2 levels for more than minimal planning, and by 4 levels for role in the offense, resulting in an adjusted offense level of 25.

4. SENTENCING FACTORS—ARTHUR HILTS, A/K/A BUTCH

Testimony at trial established that ARTHUR HILTS, A/K/A BUTCH picked up liquor at Liquor Locker, JRJ Liquors, and at BJ's Liquors until April 28, 1999. The cases from Liquor Locker will not be considered. Adding the cases from JRJ Liquors with those from BJ's through April 28, 1999, totals 12,974 cases. Applying a factor of 90 percent results in 11,676 cases. The loss for guideline purposes is thus $1,167,600.

Under U.S.S.G. §§ 2F1.1 and 3B1.1, the base offense level of 6 is increased by 11 levels due to the amount of loss involved and by 2 levels for more than minimal planning,

resulting in an adjusted offense level of 19. Because of Mr. HILTS' minor role in the criminal activity, pursuant to U.S.S.G. §3B1.2 a 2 level reduction results in offense level 17.

5. RESTITUTION

Pursuant to case law already considered by the Court on the Motion to Dismiss, restitution is not appropriate in this case since the victim is a foreign government and the loss derives from tax laws of the foreign government.

Very truly yours,

Stephen M. Schenning
United States Attorney

By: /s/ Gregory Welsh
GREGORY WELSH
Assistant United States Attorney

cc: United States Probation Office
Jensen E. Barber, Esquire
Michael J. McCarthy, Esquire
Isaac Joe, Jr., Esquire
SA Michael Murray, ATF

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MARYLAND

Criminal No. JFM-00-0202

UNITED STATES OF AMERICA,

v.

ARTHUR W. HILTS, JR.

SENTENCING MEMORANDUM

ARTHUR W. HILTS, Jr. by his attorney Isaac Joe, Jr., submits the within memorandum for consideration with respect to sentencing scheduled for June 8, 2001.

Introduction

The Court is aware of the underlying facts in this case. Mr. Hilts was a driver in the alleged "scheme". He admittedly traveled to Maryland from Niagara Falls, NY over an extended period to pick up certain kinds of liquor which he, in turn, took back to NY. The government concedes that he ceased making such pick-ups in or about April 29, 1999. There was no evidence adduced at trial that any of the liquor he transported to NY was ultimately taken into Canada.

Sentencing Factors

Loss

As the Court is aware, the government urges that the amount of loss attributable to this defendant is 11,676 cases of liquor. There was *no evidence* adduced at trial, however, that *any* of the cases of liquor that this defendant transported to New York were ultimately transported into Canada.[1] In fact,

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[1] As the Court is further aware, the only evidence of actual loss to Canada adduced at trial were the 419 bottles of liquor that had been

an ATF report indicated that they (AFT) was advised on 4/30/99 (the day after the government concedes Hilts ceased participating in the alleged "scheme"), that Hilts was "bringing illegal alcohol into the Niagara Falls area and *selling it to local retail dealers and clubs*." (See attached page of Government Exh. 20, #22). Thus, there is no basis upon which this Court can ascribe any loss to the Canadian government to *this* defendant.

Moreover, defendant is aware of Application Note 9 to Sec. 2F1.1, which states that "the loss need not be demonstrated with precision" and only "a reasonable estimate" is required "given the available information". In applying this directive, however, courts have cautioned that the loss calculation should "bear some *reasonable* relation to the *actual harm*".[2] See, e.g., *U.S. v. Krenning*, 93 F. 3d 1257, 1269 (5th Cir., 1996), *U.S. v. Melton*, 131 F. 3d 1400, 1406 (10th Cir., 1997), *U.S. v. Kopp*, 951 F. 2d 521 (3rd Cir., 1991). And, because there is no evidence that any of the liquor transported by this defendant was ultimately taken into

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"marked" in Maryland and later recovered in Canada. However, *none* of said recovered bottles were transported to New York from Maryland by Hilts; the evidence was that those bottles had been obtained from a liquor store other than the ones Hilts picked up liquor from. Hence, there is no evidence of loss to the Canadian government that can be attributed to Hilts.

[2] In *U.S. v. Haddock*, 12 f.3d 950, 960-64 (10th Cir., 1993), the Court held that an alternative method of calculating loss where "actual loss" is difficult to estimate, it is proper under Note 9 to use "the offender's gross gain". Herein, however, there is no evidence before this Court as to what, if any, "gain" might have inured to this defendant. Thus, it is inappropriate to use this method. See also, *U.S. v. Parrish*, 84 F.3d 816, 819 (6th Cir., 1996) (after first ascertaining that there was a loss, affirming use of gain for fraud defendant); *U.S. v. Haas*, 171 F.3d 259, 269-70 (5th Cir., 1999) (noting that some other circuits require some actual loss, but "according to our precedent, if the loss is either incalculable or zero, the district court must determine the Sec. 2F1.1 sentence enhancement by estimating the gain to the defendant as a result of his fraud").

Canada, there is no evidence of "actual harm" to Canada that resulted from him activities.

Jurisdiction

This defendant reiterates the argument, previously advanced, that this Court lacks jurisdiction to impose punishment for crimes allegedly committed against the government of Canada.

Respectfully submitted,

/s/ Isaac Joe, Jr.
ISAAC JOE, JR.
Attorney-at-Law
The Rotunda, Suite 300
711 W. 40th Street
Baltimore, Maryland 21211
(410) 889-8870
Attorney for Arthur W. Hilts, Jr.

United States District Court

District of Maryland

Case Number: JFM-00-0202

UNITED STATES OF AMERICA

v.

DAVID PASQUANTINO

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on or After November 1, 1987)

Defendant's Attorney: JENSEN E. BARBER, ESQ.

Assistant U.S. Attorney: GREGORY WELSH

THE DEFENDANT:

☐ pleaded guilty to count(s) ____

☐ pleaded nolo contendere to count(s) ____ which was accepted by the court.

☒ was found guilty on counts 1-6 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18:1343 & 2	WIRE FRAUD; AIDING & ABETTING	3/9/99	1

The defendant is adjudged guilty and sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s), ____

☐ Count(s) ____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's SSN: 081-40-7134
Defendant's Date of Birth: 1-29-47
Defendant's U.S.M. No.: 34157-037

JUNE 8, 2001
Date of Imposition of Judgment

Defendant's Residence Address:
7015 SUNNYDALE DRIVE
NIAGRA FALLS, NY 14304

/s/ J. Frederick Motz June 12, 2001
J. Frederick Motz, Chief
United States District Judge

Defendant's Mailing Address:
SAME AS ABOVE

Name of Court Reporter: MARY ZAJAC

DEFENDANT: DAVID PASQUANTINO

CASE NUMBER: JFM-00-0202

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:1343 & 2	WIRE FRAUD; AIDING & ABETTING	6/5/99	2
"	WIRE FRAUD; AIDING & ABETTING	9/20/99	3
"	WIRE FRAUD; AIDING & ABETTING	9/28/99	4
"	WIRE FRAUD; AIDING & ABETTING	10/2/99	5
"	WIRE FRAUD; AIDING & ABETTING	10/16/99	6

DEFENDANT: DAVID PASQUANTINO

CASE NUMBER: JFM-00-0202

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 57 months as to counts 1-6 to run concurrently with each other.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ____ a.m./p.m. on ____

☐ as notified by the United States Marshal.

☒ The defendant shall surrender, at his/her own expense, to the institution designated by the Bureau of Prisons at the date and time specified in a written notice to be sent to the defendant by the United States Marshal. If the defendant does not receive such a written notice, defendant shall surrender to the United States Marshal:

☒ within 30 days after the effective date of the mandate.

A defendant who fails to report either to the designated institution or to the United States Marshal as directed shall be subject to the penalties of Title 18 U.S.C. § 3146. If convicted of an offense while on release, the defendant shall be subject to the penalties set forth in 18 U.S.C. § 3147. For violation of a condition of release, the defendant shall be subject to the sanctions set forth in Title 18 U.S.C. § 3148. Any bond or

property posted may be forfeited and judgment entered against the defendant and the surety in the full amount of the bond.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

United States Marshal

By: _____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years as to counts 1-6 to run concurrently with each other.

The defendant shall comply with all of the following conditions:

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

STATUTORY CONDITIONS OF SUPERVISED RELEASE

The defendant shall not commit any federal, state or local crime.

In any felony case, the defendant shall not possess a firearm as defined in 18 U.S.C. § 921.

The defendant shall not illegally use or possess a controlled substance.

The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

If this judgment imposes any criminal monetary penalty, including special assessment, fine, or restitution, it shall be a condition of supervised release that the defendant pay any such monetary penalty that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment. The defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer;
2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) The defendant shall support his or her dependents and meet other family responsibilities;
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;

6) The defendant shall notify the probation officer ten days prior to any change in residence or employment;

7) The defendant shall refrain from excessive use of alcohol;

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any persons convicted of a felony unless granted permission to do so by the probation officer;

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

12) The defendant shall notify the probation officer within 72 hours of being charged with any offense, including a traffic offense;

13) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court;

14) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendants's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 600.00 ($100.00 as to each count)	$	$

☐ If applicable, restitution amount ordered pursuant to plea agreement. . . . . $

FINE

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the 15th day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☒ The court has determined that the defendant does not have the ability to pay a fine; therefore, a fine is waived.

☐ The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

- ☐ The interest requirement is waived.
- ☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

☐ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	Amount of Restitution Ordered	Priority Order or Percentage of Payment

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; and (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ In full immediately; or

B ☐ $____ immediately, balance due (in accordance with C, D, or E); or

C ☐ Not later than_____; or

D ☐ Installments to commence_____ day(s) after the date of this judgment.

E ☐ In____ (*e.g. equal weekly, monthly, quarterly*) installments of $____ over a period of _____ year(s) to commence when the defendant is placed on supervised release.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Unless the court expressly orders otherwise, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment through the Bureau of Prisons' Inmate Financial Responsibility Program.

If the entire amount of criminal monetary penalties is not paid prior to the commencement of supervision, the balance shall be paid:

☐ in equal monthly installments during the term of supervision; or

☐ on a nominal payment schedule of $_____ per month during the term of supervision.

The U.S. Probation officer may recommend a modification of the payment schedule depending on the defendant's financial circumstances.

Special instructions regarding the payment of criminal monetary penalties:

☐ Joint and Several with:

☐ The defendant shall pay the following costs of prosecution and/or court costs:

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court (before departures):

Total Offense Level: 25
Criminal History Category: 1
Imprisonment Range: 57 to 71 Months
Supervised Release Range: 2 to 3 Years

Fine Range: $ 10,000.00 to $ 1,500,000.00

☒ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $0.00

Restitution is not ordered (or only partial restitution is ordered) because:

For all offenses regardless of when committed:

☒ Consideration of restitution not mandated by statute and not appropriate under facts of the case

☐ No identifiable victim has suffered physical injury or pecuniary loss

☐ Other (see attachment, if necessary)

For offenses committed prior to April 24, 1996:

☐ Financial circumstances of the defendant

☐ Disproportionate complication/prolongation of the sentencing process

For offenses against property committed on or after April 24, 1996:

☐ Excessively large number of identifiable victims

☐ Disproportionate complication/prolongation of the sentencing process

For offenses committed on or after April 24, 1996 other than crimes of violence or offenses against property or relating to tampering with consumer products:

☐ Financial circumstances of the defendant

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

☐ The sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following specific reason(s):

United States District Court

District of Maryland

Case Number: JFM-00-0202

UNITED STATES OF AMERICA

v.

CARL PASQUANTINO

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on or After November 1, 1987)

Defendant's Attorney: MICHAEL J. MCCARTHY, ESQ.
Assistant U.S. Attorney: GREGORY WELSH

THE DEFENDANT:

☐ pleaded guilty to count(s) ____

☐ pleaded nolo contendere to count(s) ____ which was accepted by the court.

☒ was found guilty on counts 1-6 after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18:1343 & 2	WIRE FRAUD; AIDING & ABETTING	3/9/99	1

The defendant is adjudged guilty and sentenced as provided in pages 2 through 8 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s)_____

☐ Count(s) ____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's SSN: 058-34-9179
Defendant's Date of Birth: 12/22/42
Defendant's U.S.M. No.: N/A

JUNE 8, 2001
Date of Imposition of Judgment

Defendant's Residence Address:
7526 ST. JOSEPH ROAD
NIAGRA FALLS, NY 14304

/s/ J. Frederick Motz June 12, 2001
J. Frederick Motz, Chief
United States District Judge

Defendant's Mailing Address:
SAME AS ABOVE

Name of Court Reporter: MARY ZAJAC

DEFENDANT: CARL PASQUANTINO

CASE NUMBER: JFM-00-0202

ADDITIONAL COUNTS OF CONVICTION

Title & Section	Nature of Offense	Date Offense Concluded	Count Number(s)
18:1343 & 2	WIRE FRAUD; AIDING & ABETTING	6/5/99	2
"	WIRE FRAUD; AIDING & ABETTING	9/20/99	3
"	WIRE FRAUD; AIDING & ABETTING	9/28/99	4
"	WIRE FRAUD; AIDING & ABETTING	10/2/99	5
"	WIRE FRAUD; AIDING & ABETTING	10/16/99	6

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 57 months as to counts 1-6 to run concurrently with each other.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ____ a.m./p.m. on ____

☐ as notified by the United States Marshal.

☒ The defendant shall surrender, at his/her own expense, to the institution designated by the Bureau of Prisons at the date and time specified in a written notice to be sent to the defendant by the United States Marshal. If the defendant does not receive such a written notice, defendant shall surrender to the United States Marshal:

☒ within 30 days after the effective date of the mandate.

A defendant who fails to report either to the designated institution or to the United States Marshal as directed shall be subject to the penalties of Title 18 U.S.C. § 3146. If convicted of an offense while on release, the defendant shall be subject to the penalties set forth in 18 U.S.C. § 3147. For violation of a condition of release, the defendant shall be subject to the sanctions set forth in Title 18 U.S.C. § 3148. Any bond or property posted may be forfeited and judgment entered against the defendant and the surety in the full amount of the bond.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

United States Marshal

By: _____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 3 years as to counts 1-6 to run concurrently with each other.

The defendant shall comply with all of the following conditions:

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

STATUTORY CONDITIONS OF SUPERVISED RELEASE

The defendant shall not commit any federal, state or local crime.

In any felony case, the defendant shall not possess a firearm as defined in 18 U.S.C. § 921.

The defendant shall not illegally use or possess a controlled substance.

The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☐ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

If this judgment imposes any criminal monetary penalty, including special assessment, fine, or restitution, it shall be a condition of supervised release that the defendant pay any such monetary penalty that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment. The defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer;
2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) The defendant shall support his or her dependents and meet other family responsibilities;
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) The defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) The defendant shall refrain from excessive use of alcohol;

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any persons convicted of a felony unless granted permission to do so by the probation officer;

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;

11) The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;

12) The defendant shall notify the probation officer within 72 hours of being charged with any offense, including a traffic offense;

13) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court;

14) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendants's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

SUPERVISED RELEASE ADDITIONAL CONDITIONS

The defendant shall satisfactorily participate in a treatment program approved by the probation officer relating to substance and/or alcohol abuse, which may include evaluation, counseling, and testing as deemed necessary by the probation officer.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 600.00 ($100.00 as to each count)	$ -	$

☐ If applicable, restitution amount ordered pursuant to plea agreement. . . . . $

FINE

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the 15th day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☒ The court has determined that the defendant does not have the ability to pay a fine; therefore, a fine is waived.

☐ The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

☐ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	Amount of Restitution Ordered	Priority Order or Percentage of Payment

SCHEDULE OF PAYMENTS

Payments shall be applied in the following order: (1) assessment; (2) restitution; (3) fine principal; (4) cost of prosecution; (5) interest; and (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ In full immediately; or

B ☐ $____ immediately, balance due (in accordance with C, D, or E); or

C ☐ Not later than_____; or

D ☐ Installments to commence_____ day(s) after the date of this judgment.

E ☐ In____ (*e.g. equal weekly, monthly, quarterly*) installments of $____ over a period of _____ year(s) to commence when the defendant is placed on supervised release.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Unless the court expressly orders otherwise, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment through the Bureau of Prisons' Inmate Financial Responsibility Program.

If the entire amount of criminal monetary penalties is not paid prior to the commencement of supervision, the balance shall be paid:

☐ in equal monthly installments during the term of supervision; or

☐ on a nominal payment schedule of $_____ per month during the term of supervision.

The U.S. Probation officer may recommend a modification of the payment schedule depending on the defendant's financial circumstances.

Special instructions regarding the payment of criminal monetary penalties:

☐ Joint and Several with:

☐ The defendant shall pay the following costs of prosecution and/or court costs:

☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

STATEMENT OF REASONS

☒ The court adopts the factual findings and guideline application in the presentence report.

OR

☐ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court (before departures):

Total Offense Level: 25
Criminal History Category: 1
Imprisonment Range: 57 to 71 Months
Supervised Release Range: 2 to 3 Years

Fine Range: $ 10,000.00 to $ 1,500,000.00

☒ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $0.00

Restitution is not ordered (or only partial restitution is ordered) because:

For all offenses regardless of when committed:

☒ Consideration of restitution not mandated by statute and not appropriate under facts of the case

☐ No identifiable victim has suffered physical injury or pecuniary loss

☐ Other (see attachment, if necessary)

For offenses committed prior to April 24, 1996:

☐ Financial circumstances of the defendant

☐ Disproportionate complication/prolongation of the sentencing process

For offenses against property committed on or after April 24, 1996:

☐ Excessively large number of identifiable victims

☐ Disproportionate complication/prolongation of the sentencing process

For offenses committed on or after April 24, 1996 other than crimes of violence or offenses against property or relating to tampering with consumer products:

☐ Financial circumstances of the defendant

☒ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):

☐ The sentence departs from the guideline range:

☐ upon motion of the government, as a result of defendant's substantial assistance.

☐ for the following specific reason(s):

United States District Court

District of Maryland

Case Number: JFM-00-0202

UNITED STATES OF AMERICA

v.

ARTHUR HILTS

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed on or After November 1, 1987)

Defendant's Attorney: ISAAC JOE, JR.

Assistant U.S. Attorney: GREGORY WELSH

THE DEFENDANT:

☐ pleaded guilty to count(s) ____

☐ pleaded nolo contendere to count(s) ____ which was accepted by the court.

☒ was found guilty on counts One (1) after a plea of not guilty.

Title & Section	Nature of Offense	Date Offense Concluded	Count Numbers
18:1343	WIRE FRAUD	3/9/99	1

The defendant is adjudged guilty and sentenced as provided in pages 2 through 6 of this judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

☐ The defendant has been found not guilty on count(s), ____

☐ Count(s) ____ (is)(are) dismissed on the motion of the United States.

IT IS FURTHER ORDERED that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this judgment are fully paid.

Defendant's SSN: 132-52-8312
Defendant's Date of Birth: 5-31-58
Defendant's U.S.M. No.: N/A

JUNE 8, 2001
Date of Imposition of Judgment

Defendant's Residence Address:
6283 NASH ROAD
SANBORN, NEW YORK 14132

/s/ J. Frederick Motz June 13, 2001
J. Frederick Motz, Chief
United States District Judge

Defendant's Mailing Address:
SAME AS ABOVE

Name of Court Reporter: MARY ZAJAC

DEFENDANT: ARTHUR HILTS

CASE NUMBER: JFM-00-0202

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a total term of 21 months as to counts 1-6 to run concurrently with each other.

☐ The court makes the following recommendations to the Bureau of Prisons:

☐ The defendant is remanded to the custody of the United States Marshal.

☐ The defendant shall surrender to the United States Marshal for this district:

☐ at ____ a.m./p.m. on ____ .

☐ as notified by the United States Marshal.

☒ The defendant shall surrender, at his/her own expense, to the institution designated by the Bureau of Prisons at the date and time specified in a written notice to be sent to the defendant by the United States Marshal. If the defendant does not receive such a written notice, defendant shall surrender to the United States Marshal:

☒ within 30 days after the effective date of the mandate .

A defendant who fails to report either to the designated institution or to the United States Marshal as directed shall be subject to the penalties of Title 18 U.S.C. § 3146. If convicted of an offense while on release, the defendant shall be subject to the penalties set forth in 18 U.S.C. § 3147. For violation of a condition of release, the defendant shall be subject to the sanctions set forth in Title 18 U.S.C. § 3148. Any bond or property posted may be forfeited and judgment entered against the defendant and the surety in the full amount of the bond.

RETURN

I have executed this judgment as follows:

Defendant delivered on _____ to _____ at _____, with a certified copy of this judgment.

_____

United States Marshal

By: _____

Deputy U.S. Marshal

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 2 years

The defendant shall comply with all of the following conditions:

The defendant shall report to the probation office in the district to which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

STATUTORY CONDITIONS OF SUPERVISED RELEASE

The defendant shall not commit any federal, state or local crime.

In any felony case, the defendant shall not possess a firearm as defined in 18 U.S.C. § 921.

The defendant shall not illegally use or possess a controlled substance.

The defendant shall submit to one drug test within 15 days of release from imprisonment and at least two periodic drug tests thereafter, as directed by the probation officer.

☒ The above drug testing condition is suspended based on the court's determination that the defendant poses a low risk of future substance abuse. (Check, if applicable.)

If this judgment imposes any criminal monetary penalty, including special assessment, fine, or restitution, it shall be a condition of supervised release that the defendant pay any such monetary penalty that remains unpaid at the commencement of the term of supervised release in accordance with the Schedule of Payments set forth in the Criminal Monetary Penalties sheet of this judgment. The defendant shall notify the court of any material change in the defendant's economic circumstances that might affect the defendant's ability to pay restitution, fines, or special assessments.

STANDARD CONDITIONS OF SUPERVISION

1) The defendant shall not leave the judicial district without the permission of the court or probation officer;
2) The defendant shall report to the probation officer and shall submit a truthful and complete written report within the first five days of each month;
3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer;
4) The defendant shall support his or her dependents and meet other family responsibilities;
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons;
6) The defendant shall notify the probation officer ten days prior to any change in residence or employment;
7) The defendant shall refrain from excessive use of alcohol;
8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered;

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any persons convicted of a felony unless granted permission to do so by the probation officer;
10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view of the probation officer;
11) The defendant shall notify the probation officer within 72 hours of being arrested or questioned by a law enforcement officer;
12) The defendant shall notify the probation officer within 72 hours of being charged with any offense, including a traffic offense;
13) The defendant shall not enter into any agreement to act as an informer or special agent of a law enforcement agency without the permission of the court;
14) As directed by the probation officer, the defendant shall notify third parties of risks that may be occasioned by the defendants's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

CRIMINAL MONETARY PENALTIES

The defendant shall pay the following total criminal monetary penalties in accordance with the schedule of payments set forth on Sheet 5, Part B.

	Assessment	Fine	Restitution
Totals:	$ 100.00	$	$

☐ If applicable, restitution amount ordered pursuant to plea agreement. . . . . $

The defendant shall pay interest on any fine of more than $2,500, unless the fine is paid in full before the 15th day after the date of judgment, pursuant to 18 U.S.C. § 3612(f). All of the payment options on Sheet 5, Part B may be subject to penalties for default and delinquency pursuant to 18 U.S.C. § 3612(g).

☒ The court has determined that the defendant does not have the ability to pay a fine; therefore, a fine is waived.

☐ The court has determined that the defendant does not have the ability to pay interest and it is ordered that:

☐ The interest requirement is waived.

☐ The interest requirement is modified as follows:

RESTITUTION

☐ The determination of restitution is deferred until _____. An Amended Judgment in a Criminal Case will be entered after such determination.

☐ The defendant shall make restitution to the following payees in the amounts listed below.

If the defendant makes a partial payment, each payee shall receive an approximately proportional payment unless specified otherwise in the priority order or percentage payment column below.

Name of Payee	Amount of Restitution Ordered	Priority Order or Percentage of Payment

SCHEDULE OF PAYMENTS

Payments shall be applied lied in the following order: (1) assessment; (2) restitution; (3) fine principal, (4) cost of Prosecution; (5) interest; and (6) penalties.

Payment of the total fine and other criminal monetary penalties shall be due as follows:

A ☒ In full immediately; or

B ☐ $____ immediately, balance due (in accordance with C, D, or E); or

C ☐ Not later than_____; or

D ☐ Installments to commence_____ day(s) after the date of this judgment.

E ☐ In____ (*e.g. equal weekly, monthly, quarterly*) installments of $____ over a period of _____ year(s) to commence when the defendant is placed on supervised release.

The defendant will receive credit for all payments previously made toward any criminal monetary penalties imposed.

Unless the court expressly orders otherwise, if this judgment imposes a period of imprisonment, payment of criminal monetary penalties shall be due during the period of imprisonment through the Bureau of Prisons' Inmate Financial Responsibility Program.

If the entire amount of criminal monetary penalties is not paid prior to the commencement of supervision, the balance shall be paid:

☐ in equal monthly installments during the term of supervision; or

☐ on a nominal payment schedule of $_____ per month during the term of supervision.

The U.S. Probation officer may recommend a modification of the payment schedule depending on the defendant's financial circumstances.

Special instructions regarding the payment of criminal monetary penalties:

- ☐ Joint and Several with:
- ☐ The defendant shall pay the following costs of prosecution and/or court costs:
- ☐ The defendant shall forfeit the defendant's interest in the following property to the United States:

STATEMENT OF REASONS

- ☐ The court adopts the factual findings and guideline application in the presentence report.

OR

- ☒ The court adopts the factual findings and guideline application in the presentence report except (see attachment, if necessary):

Guideline Range Determined by the Court (before departures):

Total Offense Level: 17
Criminal History Category: 1
Imprisonment Range: 24 to 30 Months
Supervised Release Range: 2 to 3 .Years
Fine Range: $ 5,000.00 to $ 50,000.00

- ☒ Fine waived or below the guideline range because of inability to pay.

Total Amount of Restitution: $0.00

Restitution is not ordered (or only partial restitution is ordered) because:

For all offenses regardless of when committed:

- ☒ Consideration of restitution not mandated by statute and not appropriate under facts of the case
- ☐ No identifiable victim has suffered physical injury or pecuniary loss
- ☐ Other (see attachment, if necessary)

For offenses committed prior to April 24, 1996:

- ☐ Financial circumstances of the defendant
- ☐ Disproportionate complication/prolongation of the sentencing process

For offenses against property committed on or after April 24, 1996:

- ☐ Excessively large number of identifiable victims
- ☐ Disproportionate complication/Prolongation of the sentencing process

For offenses committed on or after April 24, 1996 other than crimes of violence or offenses against property or relating to tampering with consumer products:

- ☐ Financial circumstances of the defendant
- ☐ The sentence is within the guideline range, that range does not exceed 24 months, and the court finds no reason to depart from the sentence called for by the application of the guidelines.

OR

- ☐ The sentence is within the guideline range, that range exceeds 24 months, and the sentence is imposed for the following reason(s):
- ☐ The sentence departs from the guideline range:
  - ☐ upon motion of the government, as a result of defendant's substantial assistance.
  - ☐ for the following specific reason(s):

No. 03-725

FILED
JUL 29 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

DAVID B. PASQUANTINO, CARL J. PASQUANTINO & ARTHUR HILTS,

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

---

BRIEF FOR THE PETITIONERS

BRUCE R. BRYAN
333 East Onondaga Street
Syracuse, New York 13202
(315) 476-1800

Counsel for Petitioner Carl J. Pasquantino

JENSEN E. BARBER
JENSEN E. BARBER & ASSOCS.
400 – 7th Street, N.W.
Washington, DC 20004
(202) 737-8511

Counsel for Petitioner David B. Pasquantino

LAURA W. BRILL *
CHRISTOPHER M. NEWMAN
ALAN J. HEINRICH
KATHERINE KRAUS
PETER SHIMAMOTO
IRELL & MANELLA, LLP
1800 Avenue of the Stars
Los Angeles, California 90067
(310) 277-1010

Counsel for Petitioner Arthur Hilts

* Counsel of Record

June 29, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

QUESTION PRESENTED

Whether the federal wire fraud statute (18 U.S.C. § 1343) authorizes criminal prosecution of an alleged fraudulent scheme to avoid payment of taxes potentially owed to a foreign sovereign, given the lack of any clear statement by Congress to override the common law revenue rule, the interests of both the Legislative and Executive Branches in guiding foreign affairs, and this Court's prior rulings concerning the limited scope of the term "property" as used in the wire fraud statute.

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IN THE

Supreme Court of the United States

No. 03-725

DAVID B. PASQUANTINO, CARL J. PASQUANTINO & ARTHUR HILTS,

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF FOR THE PETITIONERS

OPINIONS BELOW

The opinion of the en banc court of appeals affirming Petitioners' convictions (Pet. App. 1a-37a) is reported at 336 F.3d 321 (4th Cir. 2003).[1] The panel opinion reversing the convictions (Pet. App. 38a-53a) is reported at 305 F.3d 291 (4th Cir. 2002). The district court's opinion denying a motion to dismiss the indictment (J.A. 60-62) is unreported.

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[1] The Appendix filed in connection with the Petition for Certiorari is cited herein as Pet. App. ___. The Joint Appendix filed in connection with merits briefing is cited herein as J.A. ___.

JURISDICTION

The court of appeals entered judgment on July 18, 2001. On April 5, 2004, this Court granted a writ of certiorari. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Title 18 United States Code Section 1343, which states:

> Whoever, having devised or intending to devise any scheme or artifice to defraud, or for obtaining money or property by means of false or fraudulent pretenses, representations, or promises, transmits or causes to be transmitted by means of wire, radio, or television communication in interstate or foreign commerce, any writings, signs, signals, pictures, or sounds for the purpose of executing such scheme or artifice, shall be fined under this title or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

On April 13, 2000, a federal grand jury in the Northern District of Maryland returned an indictment charging David B. Pasquantino, Carl J. Pasquantino and Arthur Hilts (collectively, "Petitioners"), along with four other individuals, on six counts of wire fraud and aiding and abetting wire fraud, in violation of 18 U.S.C. §§ 2 and 1343. The indictment alleged that Petitioners had engaged in a scheme "to defraud the government of Canada and the Province of Ontario of excise duties and tax revenues relating to the importation and sale of liquor." Pet. App. 57a-64a.

Petitioners moved to dismiss the indictment on the ground that the United States did not have a justiciable interest in their putative smuggling scheme against Canada, a foreign sovereign. On September 7, 2000, the district court denied the motion, and the case was tried to verdict.

At trial, the government submitted evidence that Petitioners had purchased alcohol in bulk quantities from various re-

tailers in the United States, paying all applicable state and federal taxes. Pet. App. 40a. The government then submitted evidence that some of the bottles of alcohol purchased by Petitioners had been transported across the border into Canada, and that on a few occasions Petitioners or persons allegedly associated with them had attempted to avoid inspection of the vehicles they were driving and in which they were transporting alcohol. Pet. App. 3a. The government did not present any evidence showing that Petitioners ever made any misrepresentation to any representative of the Canadian government.

The government did not provide notice pursuant to Federal Rule of Criminal Procedure 26.1 that it intended to submit proof regarding the laws of Canada or Ontario, and it did not do so. J.A. 17-46. The only evidence regarding the alleged failure to pay Canadian taxes came from a Canadian Customs Officer, Officer Jonah, who testified that alcohol "is taxed very high" in Canada, and that, according to her calculation, the various Canadian excise and sales taxes associated with the alcohol purchased by Petitioners would have totaled approximately $100 (U.S.) per case imported into Canada. J.A. 65-66. She did not explain how she arrived at this number.

Officer Jonah provided no evidence that Canada or Ontario had any pre-existing property interest in the tax revenues she had calculated, or even that the tax laws on which she based her calculation had been in effect at the time of the alleged offense. Nor did she testify as to the procedure through which the taxes she mentioned are assessed or the point at which they become due and owing under Canadian law. She provided no evidence showing that Canada's and Ontario's interests in collecting any applicable taxes were transferable or proprietary, rather than sovereign and inherently governmental, or that any Canadian court or agency had made any determination regarding the amount of taxes that Petitioners allegedly owed or planned to evade. J.A. 64-83.

The jury returned its verdict on February 13, 2001, and the district court imposed sentence on June 8, 2001. The district court sentenced Messrs. Carl and David Pasquantino to fifty-seven months' imprisonment each, and Mr. Hilts to twenty-one months. J.A. 113, 125, 136. These sentences included an enhancement based on the government's estimate of "intended loss" to Canada and Ontario pursuant to U.S.S.G. § 2F1.1 (2000). Pet. App. 24a-26a. The government calculated this loss by taking Officer Jonah's calculation as to the amount of tax imposed per case of imported alcohol under Canadian law, and multiplying it by the number of cases "involved in the scheme." J.A. 104-05. To arrive at this latter number, the government relied on testimony from various liquor retailers that approximately 90% of their documented inventory during the relevant period had been sold to Petitioners, and assumed that all of this amount was intended for importation into Canada. J.A. 92-93, 97, 104-105.[2] *Id.* Despite having advocated an enhancement based on the intended loss to Canada, the government took the position that restitution was "not appropriate in this case since the victim is a foreign government and the loss derives from tax laws of the foreign government." J.A. 106. The district court agreed and did not require restitution. J.A. 120, 132, 143.

On September 30, 2002, a panel of the United States Court of Appeals for the Fourth Circuit reversed the convictions. The majority asserted that the "determination of whether Canada was actually or would have been *entitled to the tax revenues* involves an inquiry into the validity and operation of a foreign revenue law." Pet. App. 44a (emphasis in original). The court concluded that "principles underlying the revenue rule"—which the panel described as a "long-standing common law doctrine providing that courts of one sovereign

[2] The jury was not asked to find the precise number of cases "involved in the scheme," and no specific number is reflected in the jury's verdict finding Petitioners guilty of a "scheme to defraud." J.A. 85-91.

will not enforce final tax judgments or unadjudicated tax claims of other sovereigns"—bar inquiry into Canada's entitlement to tax revenue and "therefore bar appellants' prosecution in this case." Pet. App. 44a-46a. The Fourth Circuit went on to state that the decision of the First Circuit in *United States v. Boots*, 80 F.3d 580 (1st Cir. 1996), a case holding that the revenue rule barred a wire fraud prosecution based on failure to pay foreign taxes, was better reasoned than the "flawed" decision of the Second Circuit in *United States v. Trapilo*, 130 F.3d 457 (2d Cir. 1997), which reached the opposite conclusion. Pet. App. 46a-50a. The court also rejected the notion that the revenue rule should be applied differently in civil and criminal cases. Pet. App. 49a, n.23.

The Fourth Circuit reheard the case en banc, and on July 18, 2003, affirmed the decision of the district court and reinstated Petitioners' convictions, holding the revenue rule inapplicable. Pet. App. 15a. Judge Gregory and Judge Michael dissented, arguing that the revenue rule barred Petitioners' conviction. Pet. App. 27a-37a.

INTRODUCTION TO ARGUMENT

The only harm alleged in this case is loss of Canadian tax revenue. The statutes, treaties, and common law of this country, however, all provide that U.S. courts should not be used to remedy this harm. The federal statute that prohibits smuggling into other countries, for example, applies *only* if that other country has a reciprocal provision. Canada does not. *See infra* at 45-46. The relevant treaty between the United States and Canada provides that the United States will not assist Canada in collecting taxes absent a final determination of the amount owed in Canada, and will not provide such assistance in any event against U.S. citizens. *See infra* at 47-49. Petitioners are U.S. citizens, and no Canadian authority has issued such a determination against them. Finally, the long established common law revenue rule, which is a foundational premise underlying the negotiation of international

tax agreements, provides that the courts of one nation do not, absent a treaty authorizing such comity, directly or indirectly enforce the penal or revenue laws of other sovereigns. *See infra* at 9-27.

Despite all of this, rather than extradite Petitioners to stand trial in Canada, the U.S. government has invoked the wire fraud statute to prosecute them in the United States for their alleged fraudulent evasion of Canadian revenue law. The wire fraud statute, however makes no mention of taxes or enforcement of foreign law, and the statute is limited in scope by the background common-law rules, understandings, and practices against which it was enacted. This Court has repeatedly invoked these traditional understandings to prevent unjustified prosecutorial efforts to unilaterally expand this Act of Congress to situations unsanctioned by its express terms. This case calls upon the Court to do so again.

The expansion of federal criminal law effected by Petitioners' convictions—along with the radical revision of international relations that those convictions represent—has implications going far beyond the realm of petty smuggling operations. It will affect both U.S. courts and U.S. businesses in ways that Congress has neither considered nor sanctioned. If the wire fraud statute encompasses schemes to evade foreign revenue laws, then such prosecutions will require our federal courts to determine, not only the content of those laws, but the amounts of revenue that defendants would have owed under them had they complied. In other words, our courts will have to address precisely the kinds of questions that the revenue rule guards against and that are usually entrusted to elaborate administrative bureaucracies that were created—in both the United States and many other countries—to answer them in the first instance. If affirmed, the Fourth Circuit's ruling will have the "truly horrific" result of embroiling federal courts in the substantive and procedural niceties of foreign tax laws about which they have "no

expertise." Stuart E. Abrams, *Foreign-Tax Evasion as Mail and Wire Fraud*, Business Crimes Bulletin (Feb. 2004).

Moreover, as illustrated by the continued interest that the National Association of Manufacturers has expressed in this issue,[3] the government's expansive reading of the wire fraud statute also has chilling implications for U.S. businesses that participate in international commerce. Such businesses must engage in international tax planning, often in a context where foreign revenue law—much like that of the United States—may be uncertain. This case raises the ominous possibility that alleged failures to comply with foreign revenue law may serve as bases, not only for prosecution under the wire fraud statute, but for liability under the federal racketeering and money laundering statues that use wire fraud as a predicate offense. The operation of these laws may well lead to domestic penalties far more onerous than those imposed by the foreign nations whose revenue laws are invoked. It will also lead—indeed, has already led—to repeated attempts by foreign governments to recover their uncollected tax revenues in the courts of the United States. Had Congress chosen to make the courts of this country into "the world's tax courts," it would not have left this expansion of jurisdiction to be inferred from the general language of a provision that is silent on the matter.[4] It would have said so expressly. As

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[3] *See* Brief Of The National Association Of Criminal Defense Lawyers And The National Association Of Manufacturers As Amici Curiae In Support Of Petitioners (filed concurrently herewith); Brief of the National Association of Manufacturers and United States Chamber of Commerce as Amici Curiae, *RJR*, 268 F.3d 103 (2d Cir. 2001) (No. 00-7972) (Theodore B. Olson, Counsel of Record) ("*RJR* Amicus Brief").

[4] *See RJR* Amicus Brief at 22 (arguing that RICO claims based on the theory of wire fraud at issue in this case would "create interpretive problems and drain precious judicial resources by transforming U.S. federal courts into the world's tax courts; it would also saddle U.S. multinational companies with potentially paralyzing risks of liability."); *See also* Kathryn Keneally, *The U.S. Prosecutes Foreign Tax Evasion as a Domestic Crime—With Far-Reaching Consequences*, 88 J. Tax'n 224,

demonstrated below, Congress has not done so, and the Fourth Circuit's decision upholding Petitioners' convictions must be reversed.

SUMMARY OF ARGUMENT

1. The common law revenue rule, which dates back over 200 years, provides that the courts of one country will not enforce the revenue or penal laws of another. Criminal prosecutions for "schemes to defraud" a foreign sovereign of tax revenue fall within the realm of actions traditionally barred by the revenue rule.

2. Neither the statutory text nor the legislative history of the federal enactments concerning the offenses of mail fraud or wire fraud, 18 U.S.C. §§ 1341, 1343, supports the notion that Congress abrogated the revenue rule by enacting these statutes. In the absence of any clear statement by Congress to the contrary, the interpretation of the wire fraud statute must be informed and limited by the revenue rule.

3. The wire fraud statute, 18 U.S.C. § 1343, applies to any "scheme or artifice to defraud . . . ." This Court has held that this language incorporates and is limited by the common law of fraud, except to the extent that Congress may have clearly expressed a desire to modify that law. *See Neder v. United States*, 527 U.S. 1, 21-25 (1999). As a result of the revenue rule, no fraud action existed at common law for failure to pay taxes to a foreign sovereign. Nor, in the absence of foreign customs law, which U.S. courts do not enforce, would the mere failure to disclose one's importation of goods constitute an actionable misrepresentation. Yet the convictions in this case were based on just such omissions.

228-29 (1998) (warning that this use of the mail and wire fraud statutes "will not only improperly enmesh U.S. courts in interpreting and applying those foreign tax laws . . . but also risks turning federal prosecutors into de facto criminal law enforcement agents for foreign tax authorities.").

4. The wire fraud statute is also limited to schemes aimed at obtaining "money or property" held by a victim. *Cleveland v. United States*, 531 U.S. 12 (2000). As this Court demonstrated in *Cleveland*, in order to determine whether a governmental interest qualifies as "property" under the statute, a court must carefully examine the operation of and purposes served by the laws creating this interest. *See id.* at 20-27. Uncollected taxes in general—and unadjudicated tax claims of foreign sovereigns in particular—will rarely qualify as "property." Such claims represent assertions of sovereign power, not claims predicated on the sovereign's ownership of property. Moreover, the government waived the opportunity to submit proof of foreign law, and any attempt to submit proof regarding the nature of Canada's interest in enforcing its unadjudicated tax claims would have made clear the applicability of the revenue rule by calling for the very engagement with foreign revenue law that courts have sought to avoid.

5. While the wire fraud statute contains no clear statement authorizing prosecution for failure to pay foreign taxes, the Legislative Branch, through treaties and statutes, has repeatedly recognized the existence of the revenue rule and deviated from it only upon obtaining reciprocity from a foreign government. Such reciprocity is absent in this case, and the Executive cannot unilaterally modify the terms of the wire fraud statute against the will of Congress.

ARGUMENT

I. SECTION 1343 MUST BE CONSTRUED IN LIGHT OF THE COMMON LAW RULE AGAINST ENFORCEMENT OF THE PENAL OR REVENUE LAWS OF FOREIGN SOVEREIGNS.

Congress enacted the federal wire fraud statute against the backdrop of a common law tradition recognized for hundreds of years by both this and other nations, according to which

the courts of one state do not, absent an authorizing treaty, enforce the penal or revenue laws of foreign sovereigns.[5]

[5] In the United States, *see, e.g., Banco Nacional de Cuba v. Sabbatino*, 376 U.S. 398, 413-14 (1964) (noting principle that "a court need not give effect to the penal or revenue laws of foreign countries"); *Oklahoma ex. rel. West v. Gulf, Colo. & Santa Fe Ry. Co.*, 220 U.S. 290, 299 (1911) ("The rule that the courts of no country execute the penal laws of another applies not only to prosecutions and sentences for crimes and misdemeanors, but to all suits in favor of the state . . . for any violation of statutes for the protection of its revenue[.]") (citation omitted); *The Antelope*, 23 U.S. 66, 123 (U.S. 1825) ("The courts of no country execute the penal laws of another.") (Marshall, C.J.); *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 109-26 (2d Cir. 2001) ("*RJR*") (reviewing history of and justifications for revenue rule and holding that rule bars civil RICO suit by foreign country to collect tax revenue) *cert. denied*, 537 U.S. 1000 (2002); *Aetna Ins. Co. v. Robertson*, 90 So. 120, 126 (Miss. 1921) ("[I]t is a familiar principle of law that one state or country will not aid another state or country in giving effect to judgments enforcing its penal laws, or in collecting its revenues."); *Henry v. Sargeant*, 13 N.H. 321, 332 (N.H. 1843) ("[T]he court will not notice the penal laws, or the revenue laws, of another state."); *Ludlow v. Van Renesslaer*, 1 Johnson 93, 95-96 (N.Y. Sup. Ct. 1806) ("[W]e do not sit here to enforce the revenue laws of other countries.").

In Canada, *see, e.g., United States v. Harden*, [1963] S.C.R. 366, 371 (Can.) (refusing to enforce stipulated judgment of debt entered in U.S. district court, where underlying debt had consisted of tax liability); *Stringam v. Dubois*, 135 A.R. 64 (Alta Ct. App. 1992) (rejecting suit to liquidate Canadian estate assets in satisfaction of U.S. estate taxes).

In other common-law countries, *see, e.g., Government of India v. Taylor*, 1955 A.C. 491, 508 (Eng. H.L.) (appeal taken from C.A.) ("We proceed upon the assumption that there is a rule of the common law that our courts will not regard the revenue laws of other countries[.]"); *Peter Buchanan Ltd. v. McVey*, 1955 A.C. 516, 524 (Ir. H. Ct. 1950) (hereinafter "*Peter Buchanan*") ("The Court has no jurisdiction at common law to entertain an action for the enforcement, either directly or indirectly, of a penal, revenue, or political law of a foreign State.") (citation omitted), *aff'd* 1955 A.C. 530 (Ir. Sup. Ct. 1951); *Queen of Holland v. Drukker*, [1928] 1 Ch. 877, 881-82 (Eng.) ("It seems to be plain that at any rate for somewhere about 200 years . . . the judges have . . . repeatedly said that the Courts of this country do not take notice of the revenue laws of foreign States."); *Planche v. Fletcher*, 99 Eng. Rep. 164, 165 (K.B. 1779) ("One nation does not take notice of the revenue laws of another.") (Lord Mansfield).

This principle is not only firmly embedded in judicial precedent, but is also reflected or embodied in numerous enactments of Congress, the States, and foreign nations. *See infra* at 45-50. It would be a striking and unprecedented departure from over 200 years of Western legal tradition for a sovereign—without seeking or receiving reciprocity from any of the other nations of the world—to pass a law indiscriminately rendering the customs and revenue laws of *all* those nations a basis for imposing criminal liability on its own citizens. Yet such is the Fourth Circuit's view of the wire fraud statute in this case.

A. The Reasons For The Rule Against Enforcing Foreign Penal And Revenue Laws.

As with most longstanding common law doctrines, courts invoking the revenue rule over the centuries have articulated various rationales for its existence. All of them, however, rest ultimately on an understanding that while courts will sometimes take notice of foreign laws in adjudicating the private rights of individuals within their jurisdiction, it is a fundamentally different matter for them to act as instruments for the enforcement of foreign penal and revenue laws. Such laws embody not general principles regulating private interaction, but the political will of a particular sovereign, and they enforce obligations imposed by sovereign fiat, often for purely political ends.[6] This is particularly true of revenue

[6] *See RJR*, 268 F.3d at 111 ("Tax laws embody a sovereign's political will."); *Boots*, 80 F.3d at 587 ("[R]evenue laws are positive rather than moral law[.]"); *Taylor*, 1955 A.C. at 511 ("[A] claim for taxes is but an extension of the sovereign power which imposed the taxes, and . . . an assertion of sovereign authority by one State within the territory of another . . . is (treaty or convention apart) contrary to all concepts of independent sovereignties.") (Lord Keith); *Peter Buchanan*, 1955 A.C. at 529 ("[T]he nature and incidence of governmental and revenue claims are

laws, whose most basic object is appropriation of the resources a state regards as necessary to maintain its existence and pursue its interests.[7]

Moreover, revenue laws, like penal laws, are frequently used to further various other state policies particular to the sovereign enacting them. These include maintenance of an ideologically desirable distribution of wealth, enforcement of political and moral judgments about certain persons, activities or products, and advancement of the state's perceived industrial and commercial interests.[8] The revenue rule reflects a widespread recognition that one sovereign has no

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not dictated by any moral principles, but are the offspring of political considerations and political necessity."); *Holman v. Johnson*, 98 Eng. Rep. 1120, 1121 (K.B. 1775) (Lord Mansfield) (enforcing a contract on behalf of a foreign plaintiff who knew the defendant intended to violate English customs law) ("An immoral contract it certainly is not; for the revenue laws themselves, as well as the offences against them, are all positivi juris.").

[7] *See, e.g., Moore v. Mitchell*, 30 F.2d 600, 602 (2d Cir. 1929) ("Taxes are imposts, not debts, collected for the support of the government. The form of procedure to collect them cannot change their character. . . . The enforcement of revenue laws rests, not on consent, but on force and authority.") (citations omitted), *aff'd* 281 U.S. 18 (1930); *Colorado v. Harbeck*, 232 N.Y. 71, 85 (N.Y. Ct. App. 1921) ("[T]axes are not debts or contracts. . . . Liability to pay is a consequence imposed by fiat."); *Taylor*, 1955 A.C. at 514 ("Tax gathering is not a matter of contract but of authority and administration[.]") (Lord Somervell).

[8] *See Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253, 1258 (11th Cir. 2003) ("[T]ax laws are regarded as embodying a nation's social and political policy choices."), *cert. denied*, 124 S. Ct. 1075 (2004); *RJR*, 268 F.3d at 111 ("Sales taxes, for example, may enforce political and moral judgments about certain products. Import and export taxes may reflect a country's ideological leanings and the political goals of its commercial relationships with other nations."); *Municipal Council of Sydney v. Bull*, [1909] 1 K.B 7, 12 (Eng.) ("Some limit must be placed upon the available means of enforcing the sumptuary laws enacted by foreign States for their own municipal purposes.").

general interest in assisting another to implement these types of policies, especially when they do not reflect compatible values and interests. As the Second Circuit has remarked:

> How would we respond if a foreign sovereign asked us to help enforce a tax designed to render it very expensive to sell United States newspapers in that nation? Or to make the inclusion of United States-made content in machinery built in that foreign country prohibitively expensive? Suppose it were a tax that had been raised to deter the sale of United States pharmaceuticals in that country? Or if a foreign nation imposed an immigration tax on members of a particular religious group or racial minority?

RJR, 268 F.3d at 113.[9]

Even when two nations share similar policy goals, one will not generally enforce the other's penal or revenue laws without some assurance of receiving reciprocal treatment.[10] Given the differing interests and values pursued by various nations, the extent to which such reciprocity can and should be forthcoming is a matter properly decided by those to whom the Constitution commits the powers to make treaties and to regulate foreign commerce.[11]

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[9] *See also Sabbatino*, 376 U.S. at 448 (White, J., dissenting on other grounds) ("Our courts customarily refuse to enforce the revenue and penal laws of a foreign state, since no country has an obligation to further the governmental interests of a foreign sovereign"); *Peter Buchanan*, 1955 A.C at 529 ("Such laws have been used for religious and racial discrimination; for the furtherance of social policies and ideals dangerous to the security of adjacent countries; and for the direct furtherance of economic warfare.").

[10] *See, e.g., RJR*, 268 F.3d at 121 (discussing importance of reciprocity in U.S.-Canada tax treaty); *infra* at 47-49.

[11] *See Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265, 289-90 (1888) ("the penal laws of a country do not reach beyond its own territory, except when extended by express treaty or statute to offences committed abroad by its own citizens").

In addition, as Judge Learned Hand observed, for courts to accept adjudication of claims based on foreign revenue laws would routinely put them in the position of passing on the validity and construction of those laws and determining whether the policy judgments they embody were sufficiently compatible with those of our own political system to be enforced.[12] This would both burden our courts with the onerous task of parsing foreign revenue codes,[13] and place them in the position of giving offense to certain sovereigns by singling out their laws as unenforceable.[14]

B. The Scope Of The Rule Against Enforcing Foreign Penal Or Revenue Laws.

In *Huntington v. Attrill*, 146 U.S. 657 (1892), this Court addressed the scope of the "fundamental maxim of international law" that Chief Justice Marshall had stated in the fewest possible words: "The courts of no country execute

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[12] *See Moore*, 30 F.2d at 604 ("[A] court will not recognize those [liabilities] arising in a foreign state, if they run counter to the 'settled public policy' of its own. Thus a scrutiny of the liability is necessarily always in reserve, and the possibility that it will be found not to accord with the policy of the domestic state.") (L. Hand, J., concurring).

[13] *See, e.g., Detroit v. Proctor*, 61 A.2d 412, 415 (Del. Sup. Ct. 1948) ("[T]he court may well feel very reluctant to assume the burden of administering an intricate tax system with which it is totally unacquainted[.]"); *Sargeant*, 13 N.H. at 338 (state court commenting on its own "embarrassment" in attempting to interpret the revenue laws of another state); *Taylor*, 1955 A.C. at 514 (noting that it would be "remarkable comity" for the courts of one state to assist another in the "intricate and prolonged" process of applying its tax laws); Abrams, *supra* at 7.

[14] *See Moore*, 30 F.2d at 604 (L. Hand, J.) (reasoning that courts should not put themselves in the position of having to rule whether the revenue and criminal laws of a foreign sovereign are proper); *Peter Buchanan*, 1955 A.C. at 529 (agreeing with Judge Hand that courts should not attempt to discriminate between the revenue laws of different states) ("Safety lies only in universal rejection.").

the penal laws of another." *Id.* at 666 (quoting *The Antelope*, 23 U.S. 66, 123 (1825)). As Justice Gray elaborated:

> Crimes and offenses against the laws of any state can only be defined, prosecuted, and pardoned by the sovereign authority of that state; and the authorities, legislative, executive, or judicial, of other states take no action with regard to them, except by way of extradition[.]

146 U.S. at 669. This Court has never had occasion to define the scope of this principle as it applies specifically to revenue laws, and courts in this and other countries have articulated the "revenue rule" in formulations of varying breadth and force over the centuries. Although some courts have voiced a categorical refusal to take any notice of a foreign nation's revenue laws whatsoever,[15] a more precise statement of the rule's scope as understood and applied both today and at the time the wire fraud statute was enacted is somewhat narrower: "[I]n no circumstances will the courts *directly or indirectly enforce* the revenue laws of another country." *Taylor*, 1955 A.C. at 510 (Lord Keith) (emphasis added).[16]

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[15] *See, e.g., Harbeck*, 232 N.Y. at 85 ("The rule is universally recognized that the revenue laws of one state have no force in another."); *James v. Catherwood*, [1824] 3 K.B. 190, 191 (Eng.) ("[I]n a British Court we cannot take notice of the revenue laws of a foreign state."); *Planche*, 99 Eng. Rep. at 165 (Lord Mansfield) ("One nation does not take notice of the revenue laws of another.").

[16] Lord Keith was summarizing and adopting the reasoning of the Irish High Court in *Peter Buchanan*:

> Those cases on penalties would seem to establish that it is not the form of the action or the nature of the plaint that must be considered, but the substance of the right sought to be enforced; and that if the enforcement of such right would even indirectly involve the execution of the penal law of another State, then the claim must be refused. I cannot see why the same rule should not prevail where it appears that the enforcement of the right claimed would indirectly

1. *Courts refuse requests for direct enforcement of foreign penal and revenue laws.*

The most straightforward application of the revenue rule arises when a foreign sovereign attempts to sue directly in its own right to enforce a tax judgment in the courts of another nation. Such attempts so patently violate the rule that they have been rare in the international setting.[17] For centuries, there has been an established practice that a foreign sovereign cannot sue in another country to enforce its "prerogative" or sovereign rights, such as the right to collect taxes.[18]

Within the United States, similar attempts by States to enforce their fiscal laws in the courts of other states were long rebuffed. In *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888), the state of Wisconsin sought to bring an action in this Court to enforce a judgment against a Louisiana corporation for penalties it had incurred under a Wisconsin regulatory statute. This Court held that its original jurisdiction extended only to cases that could have been brought in the courts of the defendant's state, *see id.* at 289, and that

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involve the execution of the revenue law of another State, and serve a revenue demand.

Peter Buchanan, 1955 A.C. at 527.

[17] *See, e.g., Her Majesty the Queen v. Gilbertson*, 597 F.2d 1161, 1164 n.7 (9th Cir. 1979) ("The issue is one of first impression. Apparently this is the first time in American legal history that a foreign government has sought enforcement of a tax judgment in a court of the United States.") (citation omitted).

[18] *See generally* F.A. Mann, *Prerogative Rights of Foreign States and the Conflict of Laws*, 40 Transactions of the Gro[illegible]s Society 25, 34-35 (1955) ("[Ã] foreign State cannot enforce in England such rights as are founded upon its peculiar powers of prerogative. Claims for the payment of penalties, for the recovery of customs duties or the satisfaction of tax liabilities are, of course, the most firmly established examples of this principle."); *see also* 1 Daniell's Chancery Practice at 71 (London 6th ed. 1882) ("[T]he infringement of [a foreign sovereign's] prerogative rights does not constitute a ground of suit.").

the Court lacked jurisdiction over the case in question, because "[b]y the law of England and of the United States the penal laws of a country do not reach beyond its own territory except when extended by express treaty or statute[.]" *Id.* at 289-90. In keeping with *Pelican Ins. Co.*, courts in a number of other cases refused to enforce tax claims brought by other states.[19] In *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935), this Court partially overruled *Pelican Ins. Co.* by holding that the Full Faith and Credit Clause required states to enforce judgments from other states, including judgments of tax liability. *See id.* at 276-77. The holding of *M.E. White Co.* has no application to relations between the United States and foreign sovereigns, in which sphere there is no Full Faith and Credit Clause, and in which the principles laid out in *Pelican Ins. Co.* retain their full force. *See Sun Oil v. Wortman*, 486 U.S. 717, 742 n.3 (1988) (Brennan, J., concurring). *See also infra n.* 53.

2. *Courts refuse requests for indirect enforcement of foreign penal and revenue laws.*

In the international context, the revenue rule has been understood to do far more than prevent foreign sovereigns from suing in their own right to collect on tax judgments.

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[19] *See, e.g., Moore*, 30 F.2d at 602 (action brought in New York by Indiana county treasurer to recover taxes allegedly due from estate of former Indiana resident was "repugnant to the settled principles of private international law, which preclude one state from acting as a collector of taxes for a sister state, and from enforcing its penal or revenue laws as such"); *Harbeck*, 133 N.E. at 360 (refusing attempt by Colorado to recover inheritance tax assessed upon the estate of former Colorado resident who had died in New York) ("The rule is universally recognized that the revenue laws of one state have no force in another."); *Arkansas v. Bowen*, 20 D.C. 291, 295 (D.C. Sup. Ct. 1891) ("It has been very well settled that one State will not take cognizance of or enforce the judgment of another State where such judgment is founded upon penal laws, or laws relating exclusively to the collection of the revenues of the State wherein it is rendered."), *aff'd*, 3 App. D.C. (1 Mackey) 537 (1894).

Courts of one sovereign have generally refused to adjudicate claims or defenses to claims where adjudication would have even the *indirect effect* of giving force to the prerogative rights of another, even where "the claimant is a person other than the foreign State and . . . the claim sounds in contract or in tort." Mann, *supra* n. 18 at 35.

The earliest cases illustrating this principle are those addressing the enforceability of contracts predicated upon violation of revenue laws. In *Holman v. Johnson*, the earliest English case to state the proposition that "no country ever takes notice of the revenue laws of another," the court had been asked to enforce payment on a contract for the sale, completed in France, of goods that the vendor knew would then be smuggled into England in violation of English customs law. *See* 98 Eng. Rep. 1120, 1121 (K.B. 1775). Lord Mansfield held that while a contract *requiring* violation of English revenue law—as this one did not—would be unenforceable in English courts, a contract through which a foreign plaintiff knowingly profits from the defendant's *intended* violation of that same law does not render the contract unenforceable for immorality. *See id.* at 1121. This is because "the revenue laws themselves, as well as the offences against them, are all positivi juris." *Id.* In other words, a corollary of the principle that "no country ever takes notice of the revenue laws of another" is that no citizen of one country is morally bound by the revenue laws of another. Lord Mansfield was willing to enforce contracts on behalf of foreign vendors who sold knowing their goods were destined for smuggling into England. *See* 98 Eng. Rep. at 1121 ("The seller, indeed, knows what the buyer is going to do with the goods."). One can only imagine his stupefaction at the spectacle of a sovereign subjecting its *own* citizens to criminal prosecution for "scheming to defraud" a *foreign* country of tax revenue. In cases both before and after *Holman*, Lord Mansfield and other judges have refused to give effect to foreign revenue laws that would, if recognized by the court

as binding, invalidate the contract the court was being asked to enforce.[20]

Another line of cases involves claims brought by foreign sovereigns on grounds ostensibly distinct from tax liability, but that courts nevertheless have recognized as attempts to give indirect effect to foreign revenue law. In these cases, courts concern themselves "not with form but with substance," and have held that claims arising from foreign revenue law will not be enforced under another name. *Harden*, [1963] S.C.R. at 371 (Can.) (refusing to enforce stipulated judgment of debt entered in U.S. district court, where underlying debt had consisted of tax liability); *see also Attorney General of Canada v. Schulze*, [1901] 9 Scots Law Times 4, 4-5 (refusing to enforce judgment for court costs, where costs were incurred by foreign state in defending the legality of its forfeiture of defendants' goods as penalty for infraction of revenue laws).

Even where the suit is not brought by a foreign sovereign, but by a private party seeking to enforce an ostensibly private right of action, courts have refused to enforce claims where the result would be vindication of a foreign sovereign's rights

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[20] *See, e.g., Ludlow*, 1 Johns. at 95-96 (absence of French revenue stamp on contract made in France was no obstacle to its being introduced in evidence in New York court); *Catherwood*, [1824] 3 K.B. at 191 (same holding by English court); *Planche*, 99 Eng. Rep. at 165 (Lord Mansfield) (enforcing insurance policy despite insured's falsification of bills of lading in order to evade French customs law); *Boucher v. Lawson*, 95 Eng. Rep. 53, 56 (K.B. 1734) (Lord Hardwicke) (contract to ship gold to London enforceable even though exportation of gold had been unlawful under Portuguese law). *Cf. Indian and General Investment Trust, Ltd. v. Borax Consolidated, Ltd.*, [1920] 1 K.B. 539, 550 (Eng.) (private debtor could not deduct U.S. income tax from its interest payments on loan) ("[I]t is no part of [the duty of an English Court] to enforce the Taxing Act of another country.").

under its own revenue laws.[21] Such suits have often involved bankruptcy trustees or executors seeking to enforce the right of an estate to recover assets situated in foreign countries. In *Peter Buchanan* for example, a Scottish company and its appointed liquidator sued in Ireland to recover company funds allegedly distributed by a director acting ultra vires. *See* 1955 A.C. at 516-21. Because recovery would serve to satisfy the company's tax obligations, however, the court held that it could not enforce the company's claim without indirectly enforcing Scottish revenue law. This it would not do. *See id.* at 523-30. In this and other cases, courts have refused to enforce claims that, though not directly based on revenue law, would nevertheless give effect to a foreign sovereign's revenue claim.[22]

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[21] In contrast, some private party suits have been allowed to proceed where a court was required to interpret a foreign tax law, but not to enforce its norms either directly or indirectly. *See, e.g., Sargeant*, 13 N.H. at 332 (New Hampshire court could determine whether tort defendants had acted under color of Vermont law, because "[t]he plaintiff seeks to enforce no right or claim arising under any revenue, police, or other statute of Vermont," and hence there was "no attempt to enforce the penal or revenue laws of Vermont by this action.").

[22] *See, e.g., In re Guyana Dev. Corp.*, 201 B.R. 462, 474 n.4 (S.D. Tex. 1996) (noting difficulty experienced by U.S. bankruptcy trustee overseas because foreign courts "were not interested in assisting or cooperating with [him] when they perceived him to be a collection surrogate for the IRS for payment of U.S. taxes"); *QRS 1 Aps v. Frandsen* [1999] 3 All E.R. 289, 293-94 (Eng. C.A. 1999) (rejecting suit by Danish liquidator to recover corporate funds needed to pay taxes); *id.* at 295 (discussing French case in which court refused to allow private plaintiff, whose shares had been seized and sold by the German government to discharge a tax liability, to recoup from defendant his share of the original debt); *Stringam*, 135 A.R. at 68 (rejecting suit by U.S. executor to liquidate Canadian estate assets in satisfaction of U.S. estate taxes for which U.S. probate assets were insufficient) ("An indirect attempt at enforcement is as offensive as a direct attempt and . . . one must look at the substance of the claim to determine its nature for the purposes of application of the rule.").

3. *A fraud claim based on evasion of foreign taxes falls within the revenue rule.*

Petitioners were charged with scheming to defraud the governments of Canada and Ontario of tax revenue. Pet. App. 58a. This "scheme to defraud" consisted, not of making a misrepresentation to these states that induced them to part with tax proceeds already in their possession, but of allegedly failing (a) to declare the importation of taxable goods, (b) to allow an assessment of associated taxes, and (c) to remit whatever payment would be due at the appropriate time.[23] Had either of those two governments attempted to recover these unassessed, unpaid taxes through a simple fraud claim outside of Canada, the attempt would have been rebuffed as a transparent attempt to enforce a foreign country's tax laws.[24]

In fact, this is precisely what happened when the government of Canada sought to bring a civil RICO suit predicated on a "scheme to defraud" similar to that alleged in this case. In *RJR*, the defendants had conspired to import cigarettes into

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[23] *See Pelican Ins. Co.*, 127 U.S. at 291 (distinguishing between "the recognition of a vested title in property" and a claim in which "further judicial action is sought to compel the payment by the defendant to the plaintiff of money in which the plaintiff has not as yet acquired any specific right"); *RJR*, 268 F.3d at 130 ("Canada is not asking for the enforcement of a final, fully adjudicated Canadian tax judgment, but rather, for a United States court to assess and adjudicate the application of Canadian tax laws to the wrongdoing alleged in its complaint.").

[24] *See, e.g., Banco Do Brasil, S.A. v. A.C. Israel Commodity Co.*, 190 N.E.2d 235, 237 (N.Y. Ct. App. 1963) (rejecting suit by instrumentality of Brazil to recover for an alleged conspiracy to defraud it of American dollars by illegally circumventing its foreign exchange regulations) ("[I]t is well established since the day of Lord Mansfield that one State does not enforce the revenue laws of another."); *Peter Buchanan*, 1955 A.C. at 523 (suit seeking recovery of company funds distributed in allegedly "fraudulent and void" transaction), *id.* at 527 ("[I]t is not the form of the action or the nature of the plaintiff that must be considered, but the substance of the right sought to be enforced.").

Canada without paying the taxes imposed by Canadian law. *See* 268 F.3d at 105-06. The Attorney General of Canada brought a suit to recover as damages from this "racketeering activity" both the unpaid revenues and the monies it had spent to catch the smugglers. *Id.* In an exhaustively researched opinion, the Second Circuit examined the history and policy behind the revenue rule, as well as the history of U.S. participation in international tax-treaties. *See id.* at 109-22. The court concluded that "sound policy considerations, including international comity, the proper exercise of sovereign powers, institutional competence and separation of powers, and recognition of the U.S.-Canada tax treaty relationship, support the continuing viability and application of the revenue rule[.]" *Id.* at 124-126.

In determining whether Canada's civil RICO suit fell within the scope of the rule, the Second Circuit reasoned that "a court must examine whether the substance of the claim is, either directly or indirectly, one for tax revenues. What matters is not the form of the action, but the substance of the claim." *Id.* at 130. Because the substance of Canada's claim was "to enforce, both directly and indirectly, its tax laws," and nothing in the RICO statute expressly authorized such an application, the Second Circuit held that the claim was barred by the revenue rule. *See id.* at 130-34. The Second Circuit emphasized that both the United States and Canada "have expressed a policy preference for reciprocity in the level of enforcement of each other's tax judgments and claims." *Id.* at 121. *See infra* at 46-49.

The Eleventh Circuit reached the same result in *Philip Morris Cos.*, 341 F.3d at 1258 (rejecting civil RICO suit brought to enforce foreign sovereign's tobacco taxes). These holdings, along with that of the First Circuit in *Boots*, 80 F.3d 580 (rejecting criminal application of federal wire fraud statute to scheme to evade Canadian excise taxes), demonstrate that absent a clear statement from Congress abrogating the revenue rule, the rule applies to actions arising under U.S.

federal fraud-related statutes, as well as claims in U.S. courts seeking to impose liability under tax laws directly.

C. Criminal Prosecution Of A Scheme To Evade Foreign Taxes Falls Within The Revenue Rule.

The theory underlying the government's prosecution in this case is that the revenue rule is not implicated by a criminal prosecution to enforce the federal wire fraud statute, because such a prosecution "does not seek to collect tax revenue for the foreign government." Br. in Opp. at 7. As the foregoing discussion has established however—and as the government itself has acknowledged in the past—the revenue rule is not limited to direct attempts to collect tax revenue for foreign nations, but rather applies to "claims that, *in substance, seek to enforce foreign revenue laws*." Brief for the United States as Amicus Curiae at 7, *Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.* (S.Ct. Case No. 01-1317) (Oct. 2002) (opposing certiorari) (emphasis added).[25] The question then, is whether criminal prosecution of schemes to evade foreign taxes seek in substance to enforce foreign revenue laws.

As far as Petitioners are able to ascertain, the government's recent uses of the federal wire fraud statute to provide foreign states with non-reciprocal criminal enforcement of their customs laws against U.S. citizens represent an unprecedented phenomenon in Western legal history. As no prosecutor had ever undertaken to enforce the revenue laws of a foreign sovereign in this way, there are no prior revenue rule cases directly addressing the scenario prior to the *Boots* prosecution. The government has pointed to this absence as

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[25] Indeed, as Present opposing counsel has argued in another context, "It is beyond dispute that the Revenue Rule has been consistently applied in the international community. In fact, *no court has failed to apply the rule when asked to give effect to the revenue laws of a foreign sovereign.*" *RJR* Amicus Brief at 7 (emphasis added).

proof that the revenue rule does not bar such prosecutions. Br. in Opp. at 6-7. In fact, it proves just the opposite. The historic lack of such prosecutions demonstrates that the applicability of the revenue rule in the criminal context has, like the rule against suing in foreign courts to collect tax debts, "been regarded as self-evident to all concerned." *Taylor*, 1955 A.C. at 514. Indeed, courts have not hesitated to apply the revenue rule to unprecedented actions that clearly fell within the rule's scope.[26]

The First Circuit's opinion in *Boots* was the first to address the question whether use of the federal wire fraud statute to prosecute evasion of foreign revenue laws falls within the scope of the revenue rule. The defendants had been convicted of wire fraud in furtherance of a scheme to transport tobacco into Canada without payment of Canadian excise taxes. *See* 80 F.3d at 582-83. The court's analysis was straightforward, identifying three key reasons to reverse the conviction under the revenue rule. First, upholding the conviction "would amount functionally to penal enforcement of Canadian customs and tax laws," as the essential element of a "scheme to defraud" depended entirely on "whether a violation of Canadian tax laws was intended[.]" *Id. at* 587. This, in turn, would require the court "to pass on defendants' challenges to such laws and any claims not to have violated or intended to violate them," thus "effectively passing on the validity and operation of the revenue laws of a foreign country[.]" *Id.* Finally, upholding the conviction would "have the

[26] *See Gilbertson*, 597 F.2d at 1164 n.7 (noting that best explanation for lack of precedent was that "the 'well established rule' that it cannot be done has deterred all attempts") (citation omitted); *Taylor*, 1955 A.C. at 514-15 (Lord Somervell) ("[States] have not in the past thought it appropriate to seek to use legal process abroad against debtor taxpayers. They assumed, rightly, that the courts would object to being so used."); *Drukker*, [1928] 1 Ch. at 882 (foreign sovereign could not sue to enforce claim for revenue) ("[T]he absence of authority . . . may merely indicate that it is so well recognized that it has never been put to the test.").

effect of licensing prosecutions against persons who use the wires to engage in smuggling schemes against foreign governments irrespective of whether a particular government had the reciprocal arrangement called for in [the federal anti-smuggling statute]." *Id.* at 588.[27]

The Fourth Circuit's rejection of *Boots* in this case is based on the view that prosecution under the wire fraud statute "does nothing civilly or criminally to enforce any tax judgments or claims that the foreign sovereign has or may later obtain against the defendant," and therefore does not implicate the revenue rule. Pet. App. at 13a. In other words, the Fourth Circuit held that forcing a defendant to compensate Canada for unpaid taxes would enforce Canada's revenue claim, but criminally punishing that defendant for failure to pay them—and basing the length of the sentence on the size of the alleged tax loss—does not. The distinction makes little sense; ultimately, the way we "enforce" *any* law is by threatening to punish those who fail to obey it. The non-enforcement rule is designed to avoid implementation of a foreign sovereign's public policy, not merely enrichment of its treasury.[28]

[27] As discussed *infra* at 45-46, the federal anti-smuggling statute, 18 U.S.C. § 546, provides for criminal enforcement of the customs laws of a foreign nation only when that nation has a reciprocal law.

[28] *See Gulf, Colorado & Santa Fe Ry. Co.*, 220 U.S. at 300 (refusing to exercise jurisdiction where state sought injunction to enforce its laws prohibiting the conveyance of alcohol) ("Although the State does not ask for [monetary judgment], she yet seeks the aid of this court to enforce a statute one of whose controlling objects is to impose punishment in order to effectuate a public policy touching a particular subject relating to the public welfare."); *A.G. of New Zealand v. Ortiz*, [1984] 1 A.C. 1, 20 (H.L. 1983) ("We do not sit to collect taxes for another country *or to inflict punishments for it.*") (emphasis added); *Schulze*, [1801] 9 Scots Law Times at 4-5 (foreign government could not collect costs of enforcing customs laws) ("No proceeding . . . which has for its object the enforcement by the state, whether directly or indirectly, of punishment

That issues of foreign law were not "merely incidental" to this prosecution, as the Fourth Circuit supposed, Pet. App. 14a, is apparent from Petitioners' sentences, which were based in dominant part on the revenue loss Petitioners allegedly intended to inflict on Canada and Ontario. *See* Pet. App. 36a (Gregory, J., dissenting) ("Because the bulk of the defendants' sentences were related, not to the American crime of wire fraud, but to the Canadian crime of tax evasion, I conclude that this case was primarily about enforcing Canadian law.").[29] Notwithstanding this sentencing element, the government sought to avoid a determination that it was enforcing Canadian revenue law by waiving any request for restitution in this case, on the ground that it was not appropriate in light of the revenue rule. J.A. 106. Given that 18 U.S.C. § 3663A(c)(1)(A)(ii) mandates payment of restitution to the victim of a wire fraud scheme however, the prosecutor had no authority to pick and choose which elements of Canadian law to incorporate into Petitioners' sentences. Had the prosecutor proceeded as required by law, it would have been clear to all concerned that a prosecution under the federal wire fraud statute for failure to pay taxes to a foreign sovereign is also an effort to vindicate, enforce, and assist in collecting on that foreign sovereign's claim to revenue.

Moreover, a wire fraud prosecution in which the alleged loss is tax revenue to a foreign sovereign inevitably places the courts of this country in the position of construing and

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imposed for such breaches by the *lex fori*, ought to be admitted in the Courts of any other country.") (citation omitted).

[29] The court's use of intended tax loss as a factor to enhance Petitioners' sentences violated their Sixth Amendment rights as explained in *Blakely v. Washington*, _S.Ct._, 2004 WL 1402697 at *4 (June 24, 2004) ("the 'statutory maximum' for *Apprendi* purposes is the maximum sentence a judge may impose *solely on the basis of the facts reflected in the jury verdict or admitted by the defendant*."). *See* n.2 *supra*. Petitioners sentences must be vacated in light of *Blakely*.

passing on the validity of those laws. *See Boots*, 80 F.3d at 587; *see also Cleveland*, 531 U.S. at 20-27 (analyzing Louisiana law to determine whether state held a property interest in an unissued video poker license), discussed *infra* at 35-40; *United States v. Pierce*, 224 F.3d 158, 166 (2d Cir. 2000) (reversing conviction where government failed to meet its burden to prove existence of Canadian law).

Incidentally or not, prosecutions of wire fraud based on alleged schemes to evade foreign taxes necessarily enforce the policies underlying the relevant tax laws and advance the interests, both monetary and non-monetary, of the foreign sovereign, which may be at odds with the policy objectives of this nation, as determined by Congress. This is particularly clear in the example of customs laws, whose purpose is often to discourage importation and consumption of particular items (such as alcohol) as much as to collect revenue. *See infra* 43-44. Such laws may impose not only monetary obligations, but also duties of disclosure and limits on the movement of goods, while prescribing criminal penalties for non-compliance. Indeed, this dual nature of customs law does much to illustrate why penal and revenue laws are so often mentioned in the same breath in formulations of the non-enforcement rule. When faced with either type of enactment by a foreign sovereign, courts refuse to take any action—whether to assist in collection efforts or to inflict punishments—that would advance the policy interests of other lands, unless they are expressly directed to do so by domestic statute or treaty.

II. THE WIRE FRAUD STATUTE DOES NOT ENCOMPASS PROSECUTION FOR FAILURE TO PAY TAXES TO A FOREIGN SOVEREIGN.

The prosecution in this case was based upon an interpretation of the wire fraud statute unbounded by text or history. The reach of the statute, however, is constrained

both by its text and by the background law that guides the interpretation of that text.

The wire fraud statute does not criminalize the entire panoply of wrongful conduct in which a wire transmission may be used. Rather, it penalizes "scheme[s] or artifice[s] *to defraud*," and does so only when the object is to deprive the victim of "*money or property*." 18 U.S.C. § 1343 (emphases added). These terms are not infinitely malleable. Rather, they are defined with reference to the common law of fraud, and traditional notions of property.[30] Moreover, because of the role played by the mail and wire fraud statutes in defining the additional federal offenses of racketeering and money laundering, and because of the rule of lenity, any ambiguity regarding their scope should be resolved against their application. *See Cleveland*, 531 U.S. at 24-25.

The wire fraud statute, like its predecessor mail fraud statute, was enacted against a common law background, and must be read "with a presumption favoring the retention of long-established and familiar principles, except when a statutory purpose to the contrary is evident." *United States v. Texas*, 507 U.S. 529, 534 (1993).[31] Here, the relevant

[30] *See Neder*, 527 U.S. at 20-25 (holding that the statutory phrase "scheme or artifice to defraud" applies only to deception satisfying the common-law fraud requirement of materiality); *see also Cleveland*, 531 U.S. at 26-27 (holding that unissued government license did not fall within the meaning of the statutory phrase "money or property"); *McNally v. United States*, 483 U.S. 350, 357-57 (1987) (holding that the right to "honest services" did not fall within the meaning of the statutory phrase "money or property" and rejecting argument that schemes or artifices "to defraud" and "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises" should be construed independently; rather both types of schemes are limited to those "aimed at causing deprivation of money or property.").

[31] *See also Neder*, 527 U.S. at 21-22 ("[W]here Congress uses terms that have accumulated settled meaning under . . . the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms.") (citations and

common law background includes the revenue rule,[32] which traditionally excludes a foreign sovereign's interest in collecting tax revenue from the sphere of interests that the sovereign can claim as "property" and recover through a claim alleging "fraud." Neither the text nor the legislative history of the wire fraud statute provides any ground for reading it to abrogate this rule and to authorize prosecution of conduct that has never been recognized as actionable fraud at common law.[33]

In contrast, in both ratified treaties and statutory enactments, the Legislative Branch has "clearly expressed [its] intention to define and strictly limit the parameters of any assistance given with regard to the extraterritorial enforcement of a foreign sovereign's tax laws." *RJR*, 268 F.3d at 119. Such assistance has, in every instance, been conditioned on a requirement of reciprocal treatment from the foreign government whose tax laws are to be enforced. *See infra* at 44-50. Canada provides no such reciprocal treatment, and this prosecution runs directly counter to Congress's stated policies in this area. The wire fraud statute therefore does not authorize the prosecution at issue in this case.

internal quotation marks omitted); *Morissette v. United States*, 342 U.S. 246, 263 (1952) ("[W]here Congress borrows terms of art in which are accumulated the legal tradition and meaning of centuries of practice, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word[.]"); *Standard Oil Co. v. United States*, 221 U.S. 1, 59 (1911) ("[W]here words are employed in a statute which had at the time a well-known meaning at common law or in the law of this country, they are presumed to have been used in that sense[.]").

[32] *See* Joseph Story, Commentaries on the Conflict of Laws at 338-40 (8th ed. 1883) (describing as "firmly established in the actual practice of modern nations" the "settled principle that no nation is bound to protect or to regard the revenue laws of another country[.]"); *supra* at 9-27.

[33] *Cf. RJR*, 268 F.3d at 128 n. 32 ("[T]he fundamental question in this case is whether Congress intended to abrogate [the revenue] rule in enacting RICO.").

A. Congress Did Not Overturn The Revenue Rule By Enacting The General Language Of The Wire Fraud Statute.

Section 1343 by its terms addresses schemes to "defraud" or "for obtaining money or property by means of false or fraudulent pretenses, representations, or promises[.]" This language does not mention taxes. Nor does it address the conduct alleged in this case, which involved, not "money or property," but an uncollected and unassessed foreign tax. Petitioners allegedly schemed, not to obtain money or property held by the Canadian government, but to prevent the Canadian government from exercising its regulatory authority to obtain money or property in which it had no preexisting interest *from them*.[34] Such a scenario ill fits the straightforward language of the statute, which appears on its face to be aimed at something very different.

The legislative history of the mail and wire fraud statutes corroborates the conclusion that Congress understood a "scheme" to "defraud" someone of "money or property" to consist of deceptive practices whereby the victim is induced to deliver up control of items that the victim holds as property, not schemes to avoid compliance with government regulations. The original mail fraud statute, upon which the wire fraud statute was based,[35] aimed at punishing "the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of de-

[34] Indeed, the Fourth Circuit acknowledged that what Petitioners obtained by failing to announce their importation of liquor was the ability to proceed into Canada without further inspection by Canadian customs officials, Pet. App. 18a, not money or property.

[35] *See* Act of June 8, 1872, ch. 335, § 301, 17 Stat. 293, 323. This Court has held that to the extent that the mail and wire fraud statutes have the same language, the "same analysis" applies to determining the propriety of prosecutions brought under them. *See Carpenter v. United States*, 484 U.S. 19, 25 & n.6 (1987).

ceiving and fleecing the innocent people in the country." Cong. Globe, 41st Cong., 3d Sess. 35 (1870) (remarks of Rep. Farnsworth). The intent was to prosecute frauds that injure private parties as property holders.[36] Although the statute has been amended from time to time, none of its amendments alter the conclusion that to be punishable under the wire fraud statute, a scheme must aim at obtaining something that the victim of the fraud holds as money or property.[37] *See Cleveland*, 531 U.S. at 26-27; *McNally*, 483 U.S. at 358-60. Moreover, we have found no record in the legislative history of the mail fraud statute of Congress discussing the use of this provision to punish schemes aimed at evasion of either tax obligations in general or foreign customs laws in particular.

The legislative history of the wire fraud statute is equally silent on the topic of tax evasion. The sparse history indicates simply that the wire fraud statute was designed as "a parallel [to the] provision now in the law for fraud by mail." S. Rep.

[36] These schemes included, for example, promises to sell counterfeit money and were all aimed at obtaining from a victim, something in which the victim held a proprietary interest. *See* Cong. Globe, 41st Cong., 3d Sess. at 35.

[37] In *McNally*, this Court held that the right to honest services did not fall within the definition of "money or property." See 483 U.S. at 360. Following *McNally*, Congress enacted 18 U.S.C. § 1346, which extended the statute's reach to schemes "to deprive another of the intangible right of honest services." Pub. L. No. 100-690, Title VII, § 7603(a), 102 Stat. 4508 (1988). This amendment left the holding of *McNally* in place, subject to this limited exception, so that except with respect to the right to honest services, the wire fraud statute remains limited to interference with traditional property rights. *See Cleveland*, 531 U.S at 19-20. Congress also considered adopting a more far-reaching change in law that would have provided that the terms "fraud" and "defraud," used anywhere in the United States Code, included defrauding another "of intangible rights of any kind whatsoever in any manner or for any purpose whatsoever . . ." 133 Cong. Rec. 33253 (Nov. 30, 1987) (statement of Senator Specter). This bill, which would have added a new section 7 to Title 1, Chapter 1 of the United States Code, was never enacted into law.

No. 44, 82nd Cong., 1st Sess. 19 (1951). In 1956, Congress amended the statute to criminalize uses of foreign as well as interstate wires to further a scheme to defraud a victim of money or property.[38] Before doing so, Congress obtained the view of the Department of State that "the Department perceives no objection to the enactment of the proposed amendment on the basis of international relations." Letter from Robert C. Hill to Hon. Emanuel Celler dated June 24, 1956, reprinted in 1956 U.S.C.C.A.N. at 3093. In contrast, we have found no discussion in the legislative history of the impact on foreign relations of applying these statutes to prosecute as wire fraud the failure to pay taxes to a foreign sovereign.

In short, there is no indication that Congress ever understood uncollected taxes of any type—much less those potentially owed to foreign sovereigns but as to which the foreign sovereign itself has made no adjudication—to fall within the meaning of the phrase "money or property." Nor is there any indication that Congress intended to adopt a meaning of the term "defraud" that would depart from the common law revenue rule prohibition on enforcing a tax obligation through a fraud claim in the courts of another nation. Moreover, given that Congress sought the advice of the State Department prior even to bringing the use of foreign wires within the scope of the statute, it seems rather unlikely that it would have authorized federal authorities to enforce the revenue and customs laws of every nation on Earth without so much as a single recorded discussion of this unprecedented departure from international practice.

[38] This was a narrow amendment added in order to overrule a case holding that a fraudulent telephone transmission from Mexico to California could not give rise to a wire fraud prosecution. S. Rep. No. 44, 82nd Cong., 1st Sess. 19 (1951). *See also* H.R. Rep. No. 2385, 84th Cong., 2d Sess. 1 (1956), reprinted in 1956 U.S.C.C.A.N. 3091, 3092.

B. Schemes To Avoid Foreign Tax Laws Do Not Fall Within The Common Law Scope Of Fraud And Are Therefore Outside Of The Plain Meaning Of The Wire Fraud Statute.

In *Neder*, this Court concluded that "actionable 'fraud' had a well-settled meaning at common law," and that Congress had incorporated this well-settled meaning into the mail and wire fraud statutes through its use of the term "defraud." 527 U.S. at 22-23. This Court accordingly held that a wire fraud prosecution could arise only from a misrepresentation or omission of a "material" fact, because an immaterial misrepresentation or omission was not actionable at common law. *Id.* at 23-25. The Court explained: "[U]nder the rule that Congress intends to incorporate the well-settled meaning of the common-law terms it uses, we cannot infer from the absence of an express reference to materiality that Congress intended to drop that element from the fraud statutes. On the contrary, we must *presume* that Congress intended to incorporate materiality 'unless the statute otherwise dictates.'" *Id.* at 23 (citing *Nationwide Mut. Ins. Co. v. Darden*, 503 U.S. 318, 322 (1992)); *see also*, *Field v. Mans*, 516 U.S. 59, 69-75 (1995) (holding that the term "fraud" used in Section 523(a)(2)(A) of the Bankruptcy Code incorporated common law doctrine requiring justifiable reliance).

By the same token, we must presume that Congress incorporated other well-settled limits on the common law of fraud, such as the unavailability of this claim to foreign sovereigns as a means of recovering unpaid tax revenues.[39] Had it so

[39] Similarly, modern cases have consistently barred foreign governments from bringing in the courts of this country fraud-based RICO actions based on the alleged failure to pay foreign taxes, thus demonstrating the continued applicability of the revenue rule to bar fraud claims. *See RJR*, 268 F.3d at 134; *Philip Morris Cos.*, 341 F.3d at 1261. Since the date of Petitioners' conviction, Congress has contemplated codifying the RICO ruling of *RJR*. Although Congress has not done so to date, courts

desired. Congress could have adopted a definition of fraud that expressly abrogated the revenue rule, just as it abrogated the common law requirements of reliance and damages by allowing prosecution based on mere "schemes to defraud," *see Neder*, 527 U.S. at 24-25, and just as it later expanded the scope of actionable schemes to those aimed at "the right to honest services," *see Cleveland*, 531 U.S. at 19-20. In this instance however, Congress has not done so. By failing to give sufficient weight to the limits imposed by the common law revenue rule, the Fourth Circuit expanded the scope of the wire fraud statute and altered a basic premise of our international relations, all without any direction from Congress.

The Fourth Circuit also deviated from common law principles, and relied instead on assumptions regarding Canadian law, in its treatment of whether the government had provided evidence of a material misrepresentation. The government introduced no evidence to show that Petitioners or anyone involved in the alleged scheme made any affirmative misrepresentation to the Canadian government. As the Fourth Circuit acknowledged, the only basis for finding that the materiality requirement had been fulfilled was Petitioners' "purposeful routine failure to declare their possession of imported liquor." Pet. App. 18a.[40] At common law however,

continue to rule that use of U.S. mails and wires to violate foreign tax laws cannot serve as a predicate offense for civil RICO. *See European Community v. RJR Nabisco, Inc.*, 355 F.3d 123, 135-36 (2d Cir. 2004), *petition for cert. filed*, No. 03-1427 (Apr. 12, 2004). Thus, there was no history at common law, and there is no history today, of treating tax evasion as civil fraud outside the nation in which it was committed.

[40] Officer Jonah testified that there is a primary inspection line where "the officer asks you where you live, what is your citizenship, and goods that you have entering Canada." J.A. 67. There was no evidence establishing that the customs officers ask everyone who enters the same questions, or that they asked Petitioners in particular any questions at all. Nor was any evidence presented to establish that any questions asked at the border make specific reference to alcohol, or that Canadian law imposes a duty to answer.

the mere failure to disclose information is not actionable in the absence of some special relationship or legal obligation giving rise to a duty to disclose. *See* W. Page Keeton et al., Prosser and Keeton on the Law of Torts, § 106 at 737-39 (5th ed. 1984). In this case, any such duty could arise only from Canadian law. If Canadian law does impose such a duty, however, the government gave no notice to Petitioners that it intended to submit proof on this point. *See* Fed. R. Crim. Pro. 26.1. Perhaps to advance its position that this case does not require detailed review of foreign revenue laws, the government elected not to submit any. The fact that the government relied upon presumed Canadian disclosure requirements to satisfy the materiality element, rather than proving an affirmative misrepresentation, demonstrates just how pervasively Petitioners' convictions constitute an effort to enforce foreign penal and revenue law.

C. Uncollected Foreign Taxes Do Not Constitute "Money Or Property" In The Hands Of The Government Under Section 1343.

The text of the wire fraud statute addresses neither taxes nor tax claims, whether adjudicated or unadjudicated, foreign or domestic. It penalizes only schemes to defraud someone of "money or property." This Court has consistently held that the meaning of this phrase is circumscribed by "traditional concepts of property," *Cleveland*, 531 U.S. at 24, and has rejected interpretations that would lead to an expansion of federal criminal jurisdiction in the absence of a clear statement by Congress.[41] Applying the same methods of

[41] *See Cleveland*, 531 U.S. at 20-26 (unissued video poker license was not "property" within the hands of the state of Louisiana and therefore not within scope of mail fraud statute); *Carpenter*, 484 U.S. at 25 (reaffirming that the mail and wire fraud statutes protect only property and holding that confidential business information, which has a long history of being treated as property, is within scope of these statutes); *McNally*, 483 U.S. at 359-60 (right to honest services did not fall within the term "property" as used in the wire fraud statute).

analysis this Court has used in the past leads to the clear conclusion that the unassessed, unadjudicated revenue claims of a foreign sovereign cannot be assumed to constitute "money or property" for purposes of Section 1343. To determine whether a "property" interest existed would require a detailed and intrusive analysis of the foreign laws in question, one that would conflict with the revenue rule. Moreover, there are strong reasons to believe that *no* foreign revenue claim can properly be regarded as an assertion of property rights.

1. *Under* Cleveland, *a court cannot determine a foreign sovereign's interest to constitute "property" without passing on the validity and operation of foreign law in a manner traditionally forbidden by the revenue rule.*

In *Cleveland*, this Court demonstrated that a detailed review of applicable law is required before a governmental interest can be treated as "property" under the mail fraud statute, 18 U.S.C. § 1341. Asked to determine whether Louisiana's interest in an unissued video poker license was a property interest, this Court engaged in a thorough analysis of the state law in question. First, the Court examined the statutory provisions regarding these licenses, concluding that "whatever interests Louisiana might be said to have in its video poker licenses, the State's "core concern is *regulatory*." *Id.* at 20-21 (emphasis in original). The Court reached this determination in part because of the involvement of the State Police in regulating licensing and the fact that the statute defines criminal penalties for unauthorized use of the devices that required a license. *Id.* at 21-23. Although the Court recognized that the State "has a substantial economic stake in the video poker industry," it found this interest inadequate to create a property right in unissued licenses. *Id.* at 22. Nor did the fact that the defendants in that case had "frustrated the State's right to control the issuance, renewal, and revocation

of video poker licenses" affect a "property" interest. Rather, this Court held that "these intangible rights of allocation, exclusion, and control amount to no more and no less than Louisiana's sovereign power to regulate." *Id.* at 23.

The Court went on to address the government's contention that the State's licensing scheme was similar to a patent right because it encompassed the right to exclude, concluding that "[a]lthough it is true that both involve the right to exclude, we think the congruence ends there." *Id.* at 23. Significant to the Court's analysis was the fact that the State of Louisiana could not transfer its licensing authority and did not act as a market participant in the industry. "Louisiana does not conduct gaming operations itself, it does not hold video poker licenses to reserve that prerogative, and it does not 'sell' video poker licenses in the ordinary commercial sense. Furthermore, while a patent holder may sell her patent, . . . the State may not sell its licensing authority." *Id.* at 23.[42]

The Court also rejected the government's argument that the State, in authorizing video poker licensees, was acting like a franchisor selecting its franchisees. The court noted that a franchisor's rights derive from its ownership interest in an underlying asset and its participation in the market.

> Louisiana's authority to select video poker licensees rests on no similar asset. It rests instead upon the State's sovereign right to exclude applicants deemed unsuitable to run video poker operations. A right to exclude in that governing capacity is not one appropriately labeled

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[42] According to the Court in *Cleveland*, "[i]nstead of a patent holder's interest in an unlicensed patent, the better analogy is to the Federal Government's interest in an unissued patent. That interest, like the State's interest in licensing video poker operations, surely implicates the Government's role as sovereign, not as property holder. *See* U.S. Const., art. I, § 8, cl. 8." 531 U.S. at 23-24. Similarly, the Canadian interest at stake in this case flows not from the Canadian government's ownership of property but from its sovereign power to regulate the entry of persons and goods into a country which it governs but does not own.

> 'property.' . . . . In short, the State did not decide to venture into the video poker business; it decided typically to permit, regulate, *and tax* private operators of the games.

Id. at 24 (emphasis added).

Finally, the Court rejected the government's reading of the mail fraud statute because it would result in a "sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Id.* at 24. The Court noted that the State of Louisiana itself provides for criminal penalties for making false statements in license applications and observed that "unless Congress conveys its purpose clearly, it will not be deemed to have significantly changed the federal-state balance in the prosecution of crimes." *Id.* at 24-25 (citations and internal quotation marks omitted). Congress has not amended the mail fraud or the wire fraud statutes since *Cleveland* to alter the factors that determine whether a government interest qualifies as "property." Accordingly, they remain (1) whether the interest is regulatory (as demonstrated in part by the existence of criminal penalties attaching under the law of the relevant jurisdiction for conduct that interferes with the government's authority);[43] or proprietary; (2) whether the interest is transferable; and (3) whether the interest otherwise comports with the "traditional concepts of property."

Making the inquiry called for by *Cleveland* with respect to foreign revenue law is a highly intrusive endeavor requiring a detailed inquiry into complex substantive and procedural issues under foreign tax systems. As to transferability, for example, under any particular legal regime, a tax claim may be (1) entirely unassignable, (2) assignable only once it has been reduced to a judgment, or (3) assignable at some other

[43] *Cf.* J.A. at 51 (noting that Petitioners were criminally indicted in Canada for their violations of Canadian customs law).

time, such as after assessment (or its equivalent)[44] or after exhaustion of all appeals. Whether and at what stage a tax claim is assignable may depend in turn on whether the law of the relevant jurisdiction regards taxation as an inherently governmental function, which itself may be a complex and intrusive judicial inquiry. In addition, courts adjudicating such claims will necessarily have to consider such issues as whether the tax at issue is valid under foreign law, as well as whether it violates U.S. public policy, including constitutional principles, trade policies, and other significant public policy considerations.[45] Courts will also be required to determine

[44] In the United States, assessment is the formal recordation by the government of a taxpayer's liability, and reflects the government's determination of the amount owed. 26 U.S.C. § 6203. The government may either accept the taxpayer's report of the amount due, or independently verify the amount by auditing the taxpayer. 26 U.S.C. §§ 6201(a)(1), 7602(1). "[A]n assessment has 'the force of a judgment'" and generally enables the government to require immediate payment. *See* Michael I. Saltzman, IRS Practice and Procedure ¶ 10.01[1] (rev. 2d ed. 2004) (quoting *Bull v. United States*, 295 U.S. 247, 259 (1935)); *see also Hibbs v. Winn*, 124 S.Ct. 2276, 2285-86 & n.3 (2004) (reviewing function of assessment in tax law). Under a U.S.-Canada Tax Treaty, for example, the United States will provide no assistance to Canada in collecting taxes unless the amount of the tax has been "finally determined" in Canada. Revised Protocol Amending the Convention With Respect to Taxes on Income and on Capital of September 26, 1980, Mar. 17, 1995, U.S.-Canada, art. 15, S. Treaty Doc. No. 104-4 ("Revised Protocol"). There is no evidence in this case that Canada performed any equivalent of an assessment or otherwise made a final determination relating to Petitioners' tax liability.

[45] Trade disputes that are or have been before the World Trade Organization include numerous disputes between the United States and Canada and three separate disputes between the United States and other countries relating to liquor taxes of these countries. *See* U.S. Trade Rep., Snapshot of WTO Cases Involving the United States, available at http://www.ustr.gov/enforcement/snapshot.html (updated Mar. 9, 2004); U.S. Trade Rep., Dispute Settlement Update, available at http://www.ustr.gov/enforcement/update.html (updated Mar. 9, 2004). One recent trade dispute concerned a discriminatory Turkish tax on box office receipts for motion pictures, a tax that may implicate free speech, as well as free trade

whether the tax in question is aimed not just at raising money, but also at regulating behavior, as many taxes, including those on alcohol and tobacco, often are. *See infra*, at 43-44. A healthy skepticism about the propriety of U.S. courts making such determinations prompted Judge Hand's concurrence in *Moore*. *See supra* at 14.

This Court's decision in *Cleveland* shows that Judge Hand's concern in *Moore* applies with full force to criminal prosecutions brought under the wire fraud statute. That the Executive Branch is bringing such a prosecution in no way relieves the court of the burden of passing on the "validity and operation" of foreign revenue law. *See Boots*, 80 F.3d at 588 ("whether conduct is criminal cannot be a determination left solely to prosecutorial discretion."). For U.S. courts to make such determinations necessarily affects the foreign relations of the United States. Absent the clearest statement by Congress requiring the courts of this country to venture into such terrain, this Court should long hesitate before concluding that the wire fraud statute so dramatically altered the role of the United States courts in foreign relations.[46]

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concerns. *See* U.S. Trade Rep., Section 301 Table of Cases as of Aug. 9, 2002 ("2002 Table of Cases"), available at www.ustr.gov/html/act301.htm#301_80; *Leathers v. Medlock*, 499 U.S. 439 (1991). The United States has sparred with Ontario directly regarding the legality of its beer taxes. *See* 2002 Table of Cases.

[46] *See F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S.Ct. 2359, 2366 (2004) ("[T]his Court ordinarily construes ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations."); *Benz v. Compania Naviera Hidalgo, S.A.*, 353 U.S. 138, 144, 147 (1957) (declining to apply act of Congress to facts affecting foreign relations where "[i]t appears not to have even occurred to those sponsoring the bill" that the Act would cover such circumstances, and noting that "[f]or us to run interference in such a delicate field of international relations there must be present the affirmative intention of Congress clearly expressed."); *cf. Cleveland*, 531 U.S. at 24-25 (declining to interpret wire fraud statue in such a way that would alter the "federal-state balance in the prosecution of crimes") (citations and internal quotation marks omitted).

2. *There is no basis for concluding that the governmental interest at issue in this case would quality as "property" under* Cleveland.

The government made no effort in this case to establish that Canada's or Ontario's interest in receiving tax revenue had the qualities of "property." The only evidence introduced at trial regarding any such interest was the testimony of Officer Jonah, who was not offered as an expert on Canadian law. Officer Jonah stated that Canada and Ontario impose sales and excise taxes on imported alcohol, and she purported to calculate the amount of Canadian taxes per case. J.A. 65-66. This testimony did not address the nature of Canada's interest. Nor did the district court instruct the jury that it had to determine whether the unpaid taxes qualified as "money or property," saying rather that the requisite intent would exist if Petitioners intended to cause these governments "some loss." J.A. 89. Ultimately, neither the district court nor the Fourth Circuit engaged in the analysis of Canadian law required by *Cleveland*, relying instead on an unsupported assumption that the Canadian interests at issue constitute "property."[47] This assumption, however, was not only unsupported, but erroneous. Unadjudicated tax claims of a foreign sovereign do not fall within the "traditional concept of property." 531 U.S. at 24.

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[47] The Fourth Circuit asserted that "a government has a property right in tax revenues when they accrue." Pet. App. 16a (citing *Manning v. Seeley Tube & Box Co.*, 338 U.S. 561, 566 (1950)). The Fourth Circuit, however failed to cite any Canadian authority on point, but rather cited a case dealing with the U.S. Internal Revenue Code, which is not typically regarded as an authoritative source for issues of Canadian customs law. Moreover, the *Manning* case addresses issues relating to the accrual of interest, rather than whether the government's interest is proprietary and transferable.

Taxes in general, and import taxes on "sin" products such as alcohol and tobacco in particular, are generally regulatory in nature. The origin of any governmental claim of right to tax revenues is generally sovereign fiat, not labor or capital investment. *New Energy Co. v. Limbach*, 486 U.S. 269, 277 (1988) (describing the "assessment and computation of taxes" as "a primeval governmental activity."). In the United States, for example, the U.S. Constitution grants Congress the "Power To lay and collect Taxes, Duties, Imposts and Excises." U.S. Const., art. I, § 8. "No Tax or Duty shall be laid on Articles exported from any State." U.S. Const., art I., § 9, cl. 5. "All Bills for raising Revenue shall originate in the House of Representatives. . . ." U.S. Const., art. I, § 7. The Sixteenth Amendment provides Congress with the "power to lay and collect taxes on incomes, from whatever source derived." U.S. Const., amend. XVI. At its founding, the United States, in its sovereign power, even constitutionalized the ultimate sin tax, providing that slavery could not be abolished until 1808, but that "a Tax or duty may be imposed on such Importation, not exceeding ten dollars for each Person." U.S. Const., art. I, § 9, cl. 1.

In light of the inherently sovereign basis of our own tax laws, no court should presume that simply because a foreign tax is capable of generating revenue for a governmental entity, that government's interest in tax collection qualifies as "money or property" for purposes of the wire fraud statute. *See Cleveland*, 531 U.S. at 22 (fact that grant of license would result in future income did not render it property in the hands of the State). Today, the United States classifies tax assessment and collection as "inherently governmental functions." *See* Federal Activities Inventory Reform Act of 1998 ("FAIR Act") § 5(2)(B)(i)-(v), Pub. L. No. 105-270, 112 Stat. 2382. Indeed, the Executive's own policy is to treat, for purposes of the wire fraud statute, the government's interest in collecting tax revenue as regulatory, not

proprietary, and not to use the mail or wire fraud statutes to prosecute cases in which the alleged loss is tax revenue.[48]

Treaties relating to tax issues also recognize the power to tax as a "sovereign right." *See, e.g.*, WHO Framework Convention on Tobacco Control, art. 6 (signed by U.S. May 10, 2004, not yet in force or ratified by Senate) ("FCTC"), as do cases and commentaries regarding the revenue rule, *see supra* at nn.6-7, 18. Indeed, the government's concession that under the revenue rule, "the courts of one sovereign will not enforce the tax judgments or unadjudicated tax claims of another sovereign," Br. in Opp. at 7, is tantamount to an admission that tax obligations owed to a foreign sovereign are not the same thing as "money or property." If they were, the courts of this country would perforce permit a foreign sovereign to recover the sums owed to it through an action in the courts of this country. *See, e.g., The Sapphire*, 78 U.S. 164, 167 (1870) ("A foreign sovereign, as well as any other foreign person, who has a demand of a civil nature against any person here, may prosecute it in our courts.").

Taxes on products such as alcohol and tobacco are also presumptively "regulatory" for the additional reason that such taxes are generally aimed at regulating demand for such products. This Court has recognized such taxes as "mixed-motive taxes" because they serve "both to deter a disfavored activity and to raise money." *Department of Revenue of Montana v. Kurth Ranch*, 511 U.S. 767, 780 (1994). International instruments, such as the FCTC, recognize the

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[48] *See* U.S. Attorney Manual, Title 6, Tax Resource Manual, 18 Tax Division Directive No. 99, Charging of Tax Crimes as Mail, Wire or Bank Fraud or as RICO or Money Laundering Predicates (Mar. 30, 1993) (stating that mail, wire, and bank fraud prosecutions are not appropriate when the alleged loss is to the government in its revenue-raising role); U.S. Attorney Manual § 6-4.210 (distinguishing prosecutions that relate to fraudulent tax shelters because such violations cause pecuniary harm to private parties).

deterrent effect of taxation on consumption of such products. *Id.*, art. 6, § 1 ("price and tax measures are an effective and important means of reducing tobacco consumption by various segments of the population, in particular young persons.").[49] The regulatory function of taxes of this type causes such taxes to fall well outside of the types of interests that have been traditionally recognized as property.

III. NUMEROUS OTHER ACTS OF THE LEGISLATIVE BRANCH DEMONSTRATE THAT THE WIRE FRAUD STATUTE DOES NOT APPLY TO SCHEMES AIMED AT FOREIGN TAX EVASION.

The lack of a clear statement by Congress authorizing wire fraud prosecutions for schemes aimed at foreign tax evasion is hardly surprising. The Legislative Branch's clearly expressed policy is *not* to authorize the type of prosecution

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[49] Canada itself has stated that its tobacco tax policy is aimed at deterrence. *See RJR*, 268 F.3d at 113 (citing Canada's Complaint) ("Tobacco duty and tax increases, and the resulting higher tobacco prices, held the promise of deterring young people from becoming addicted to a harmful drug [and] of encouraging established smokers to quit."). Many States similarly promote temperance, health, safety, and morals through alcohol regulation, including alcohol taxation. *See, e.g.*, Ala. Code §§ 28-3-2, 7A (1975); Colo. Rev. Stat. §§ 12-47-102, 12-47-503 (West Supp. 2004); Fla. Stat. §§ 562.01, 562.32, 562.408 (West Supp. 2004); 235 Ill. Comp. Stat. 5/1-2, 8-1 (2004); Ind. Code § 7.1-1-1-1, tit. 7.1, art. 4 (West Supp. 2004); Iowa Code §§ 123.1, 123.37, 123.136, 123.183 (West Supp. 2003); Md. Ann. Code, art. 2B, § 1-101, § 5-102 (West Supp. 2004); Mont. Code Ann. §§ 16-1-101, 16-1-401-411 (West Supp. 2004); Neb. Rev. Stat. §§ 53-101.01, 53-101.05, 53-160 (2003); N.J. Rev. Stat. §§ 33:1-3.1, 54:41-47 (West Supp. 2004); N.Y. Alco. Bev. Cont. Law §§ 2, 125 (McKinney 2004); Okla. Stat. tit. 37, §§ 503, 553 (West Supp. 2004); Or. Rev. Stat. §§ 471.030, 473.030, 473.035 (2003); 47 Pa. Cons. Stat. §§ 1-104, 795 (West 2004); Tex. Alco. Bev. Code §§ 1.03, 201.03 (Vernon 2004); Vt. Stat. Ann. tit. 7 §§ 1, 421, 422 (2003); Wash. Rev. Code §§ 66.08.010, 66.24.210, 66.24.290 (West Supp. 2004); W. Va. Code §§ 60-1-1, 60-3A-21, 60-8-4 (West Supp. 2004).

that the Executive is pursuing in this case. Rather, the Legislative Branch's policies include (1) authorizing enforcement of foreign tax laws only upon receiving a commitment of reciprocity; (2) declining to extend reciprocal agreements, even where they exist, to provide for the enforcement of foreign tax laws against U.S. citizens; and (3) protecting U.S. courts from the need to apply foreign tax laws in the absence of guidance from the relevant country on how it would apply its own law to the case at hand.

The Executive Branch is not the repository of the entire foreign relations power of the United States. Rather, the U.S. Constitution grants to Congress the power to regulate commerce with foreign nations and provides that the Treaty power is shared between the Executive and the Senate, with the Senate having the power to advise and consent. U.S. Const., art. I, § 8; art. II, § 2, cl. 2. In taking care that the laws of the United States are "faithfully executed," U.S. Const., art. II, § 3, the Executive Branch is not free to disregard the will of the Congress and the Senate expressed in statute and treaty. Nor is the Executive free to take from the Judiciary the power "to say what the law is." *Marbury v. Madison*, 5 U.S. 137, 177 (1803).

Acts of Congress: Congress has enacted a statute expressly addressing smuggling into foreign countries, the precise conduct alleged in this case. *See* 18 U.S.C. § 546. In so doing, Congress imposed a significant limitation. The provision does not apply unless the country into which goods are smuggled itself has a reciprocal law criminalizing smuggling into the United States. *Id.* Canada has no such reciprocal law. *See United States v. Miller*, 26 F. Supp. 2d 415, 424-26 (N.D.N.Y. 1998) (dismissing § 546 counts on grounds that Canadian law does not provide reciprocity). Charging a defendant with wire fraud for bringing goods into a country that lacks a reciprocal law on point is therefore directly contrary to Congress's will as expressed in a more specific statute. It is "familiar law" that "a specific statute controls

over a general one without regard to priority of enactment." *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) (citations omitted).[50]

Treaties ratified by the U.S. Senate: In light of the common law rule that nations do not, absent express agreement, assist one another with tax enforcement efforts, the United States has negotiated several bilateral and multi-lateral international agreements governing the extent of tax assistance that this nation is willing to provide to other nations on reciprocal terms.[51] No such agreement of which we are aware provides for criminal punishment in one nation based on alleged violations of another nation's tax laws. Rather, such agreements typically provide for information exchange and sometimes, in exceptional cases, for limited collection assistance. *See RJR*, 268 U.S. at 115-22.[52] The agreements

[50] *Cf.* U.S. Attorney Manual, § 6-4.210 ("charging a [U.S.] tax offense as a mail fraud charge could be viewed as circumventing Congressional intent" in light of the fact that Congress has defined specific offenses relating to tax violations).

[51] *See, e.g.*, Dennis D. Curtin, *Exchange of Information under the United States Income Tax Treaties*, 12 Brooklyn J. Int'l L. 35, 35 (1986) ("To circumvent the application of [the revenue rule], many countries have entered into bilateral income tax treaties."); Alan R. Johnson, *Systems for Tax Enforcement Treaties: The Choice Between Administrative Assessments and Court Judgments*, 10 Harv. Int'l L. J. 263, 263 (1969) (noting that nations have adopted international agreements relating to tax enforcement to surmount the "obstacle" of the revenue rule and that even by 1969, well after Congress enacted the wire fraud statute, "the United States ha[d] taken only tentative steps" in entering agreements providing for international tax assistance).

[52] Similarly, the treaty between Canada and the United States on legal assistance in criminal matters does not provide for prosecution by one country of criminal conduct occurring in the other. *See* Treaty on Legal Assistance in Criminal Matters, Mar. 18, 1985, U.S.-Can., Treaty Doc. No. 100-14. Rather, the treaty principally addresses investigatory matters, such as the taking of testimony and the execution of requests for searches and seizures. *See id.* arts. X-XVI. U.S. citizens who have committed criminal violations of any Canadian tax law can be extradited to stand trial in Canada. *See* Treaty on Extradition Between the United States and Canada, art. 2(2)(ii), T.I.A.S. 8237; 27 U.S.T. 983; 1971 U.S.T. Lexis 226 (entered into force Mar. 22, 1976) (providing, in apparent recognition of the revenue rule, that "[a]n offense is extraditable notwithstanding . . . that it relates to taxation or revenue . . ."). Revised Protocol, art. 15 (adding art. XXVI A,

are generally sensitive to the difficulties that our courts would face in interpreting foreign tax laws and for that reason commitments of collection assistance generally do not extend to unadjudicated tax claims. *Id.* at 116-17 & 121 & n.19 (noting that providing enforcement assistance even as to finally determined tax claims goes beyond the norm). Our own income tax code, income tax regulations, and other taxing statutes, both state and federal, are exceedingly complex and subject to extensive interpretation. A foreign government's would be no less so. *See* Abrams, *supra* at 7.

The Second Circuit's decision in *RJR* provides a detailed analysis of the history and content of U.S. tax agreements, including the tax treaty between the United States and Canada, concluding that

> the usual absence in our negotiated tax conventions of any provision for the extraterritorial enforcement of a sovereign's tax judgments or claims cannot be . . . accidental, but instead must reflect the considered policy of the political branches of our government. Thus, the political branches of our government have clearly expressed their intention to define and strictly limit the parameters of any assistance given with regard to the extraterritorial enforcement of a foreign sovereign's tax laws.

268 F.3d at 119.

This country's tax treaty with Canada is no exception to that rule. The collection provisions of this treaty apply to "all categories of taxes collected by or on behalf of the Government of a Contracting State," including customs and excise taxes. Revised Protocol, art. 15 (adding art. XXVI A,

¶ 9 to treaty); *see also*, *RJR*, 268 F.3d at 120 & n.17.[53] The Contracting States will not give collection assistance unless the other nation certifies that a revenue claim has been "finally determined," which is defined to mean the point at which the "applicant State has the right under its internal law to collect the revenue claim and all administrative and judicial rights of the taxpayer to restrain collection in the applicant State have lapsed or been exhausted." Revised Protocol, art. 15 (adding art. XXVI A, ¶ 2 to treaty).

In addition, the Revised Protocol states that "[n]o assistance shall be provided" with regard to Canadian revenue claims against persons—like the petitioners in this case—who are U.S. citizens at the time that the tax liability is incurred. *Id.*, (adding art. XXVI A, ¶ 8 to treaty). Finally, in the Revised Protocol, the United States and Canada committed that they would agree "to ensure comparable levels of assistance to each Contracting State." *Id.* (adding art. XXVI A, ¶ 11 to treaty). As the Second Circuit stated in *RJR*, "[i]n other words, both governments have expressed a policy preference for reciprocity in the level of enforcement of each other's tax judgments and claims." 268 F.3d at 121-22 & n.20 (citing 18 U.S.C. § 546 (the anti-smuggling statute) and

[53] Agreements providing this level of assistance are the exception, not the rule. *RJR*, 268 F.3d at 116-18. The United States Model Income Tax Convention of Sept. 20, 1996, released by the U.S. Department of Treasury, for example, contains no general provision agreeing to assist in the collection of foreign taxes or allowing the enforcement of foreign tax judgments or claims. *See RJR*, 268 F.3d at 118. Indeed, when the United States ratified the Convention on Mutual Administrative Assistance In Tax Matters, among the Member States of the Organization for Economic Cooperation and Development ("OECD"), Mar. 18, 1985, Treaty Doc. No. 100-14, it did so subject to a reservation that the United States "will not provide assistance in the recovery of any tax claim, or in the recovery of an administrative fine, for any tax." Staff of Joint Comm. on Taxation, 104th Cong., Explanation of Proposed Protocol to the Income Tax Treaty Between the United States and Canada (Comm. Print May 23, 1995), at 42.

Boots, 80 F.3d at 588). The Second Circuit's further comment regarding reciprocity is equally apt to this case:

> Declining to apply the revenue rule in this case would arguably undermine the considered policy judgments of our political branches. Moreover, it would potentially allow Canada to obtain assistance it has not negotiated for . . . .

RJR, 268 F.3d at 122. As was the case in *RJR*, allowing the prosecution in this case would grant Canada greater enforcement assistance than our government would likely receive in return. *Id.*[54] The Revised Protocol thus counsels strongly against interpreting the wire fraud statute to authorize prosecution of U.S. citizens regarding unadjudicated foreign tax claims.[55]

[54] The reciprocity requirement also remains in force between the States, which are not required by the holding of *M.E. White Co.* to enforce tax claims not reduced to final judgment in the courts of the claimant state. *See* 296 U.S. at 275. By 1978 forty-five states had enacted laws allowing their courts to enforce tax claims only on behalf of those States that extended reciprocal rights. *See* H.R. Rep. No. 95-1366, 95th Cong., 2d Sess. (1978) (listing States). Observing this, Congress enacted the same rule for the District of Columbia. *See* District of Columbia Reciprocal Tax Collection Act, 92 Stat. 751. In addition, thirty states (as well as the District of Columbia and the Virgin Islands) have adopted the Uniform Foreign Money-Judgments Recognition Act, which codifies the revenue rule by defining the term "foreign judgment" to exclude "judgment[s] for taxes." *See* Unif. Foreign Money-Judgments Recognition Act, §§ 1-4, adopted by, e.g., Cal. Civ. Proc. § 1713.1 *et seq.*; D.C. Code § 15-381 *et seq.*; Md. Code Ann., Cts. & Jud. Proc. § 10-701 *et seq.*; N.Y. C.P.L.R. 5301 *et seq.*; Va. Code Ann. § 8.01-465.7 *et seq.*

[55] The Second Circuit panel in *RJR* could not overturn the prior precedent of that Court in *Trapilo*, 130 F.3d 547, which had upheld, over a revenue rule objection, a prosecution for money laundering based on failure to pay foreign taxes. The portion of the *RJR* opinion in which the majority seeks to justify treating civil claims and criminal claims differently, however, is entirely unconvincing, 268 F.3d at 122-24, as it fails to address at all the role of the Legislative Branch in foreign affairs or to demonstrate that Congress abrogated the revenue rule in enacting the wire

The collective force of these treaties and statutes demonstrates that the lack of a clear statement applying the wire fraud statue to foreign revenue offenses is no accident. It is the product of deliberative judgment of both Legislative bodies to retain the revenue rule and to deviate from it only upon obtaining reciprocity. Canada has not seen fit to penalize smuggling into the United States or to punish as wire fraud tax violations against the United States that employ Canadian telephones or other wire transmissions. The prosecution in this case diminishes any incentive Canada may have had to do so. Although there is no doubt that the Executive has power in the field of foreign affairs, the Executive may not treat as irrelevant Congress's and the Senate's clearly expressed view that the bargaining position of the United States should not be so compromised.

CONCLUSION

For the foregoing reasons, Petitioners respectfully urge the Court to reverse the judgment of the Fourth Circuit and to order Petitioners' convictions and sentences to be vacated.

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fraud statute. *cf. id.* at 139 (Calabresi, J., dissenting) ("there is no basis in the revenue rule itself for treating criminal and civil cases differently").

Respectfully submitted,

BRUCE R. BRYAN
333 East Onondaga Street
Syracuse, New York 13202
(315) 476-1800

Counsel for Petitioner
Carl J. Pasquantino

JENSEN E. BARBER
JENSEN E. BARBER & ASSOCS.
400—7th Street, N.W.
Washington, DC 20004
(202) 737-8511

Counsel for Petitioner
David B. Pasquantino

June 29, 2004

LAURA W. BRILL *
CHRISTOPHER M. NEWMAN
ALAN J. HEINRICH
KATHERINE KRAUS
PETER SHIMAMOTO
IRELL & MANELLA, LLP
1800 Avenue of the Stars
Los Angeles, California 90067
(310) 277-1010

Counsel for Petitioner
Arthur Hilts

* Counsel of Record

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In the Supreme Court of the United States

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v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE UNITED STATES

PAUL D. CLEMENT
Acting Solicitor General
Counsel of Record

CHRISTOPHER A. WRAY
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

IRVING L. GORNSTEIN
Assistant to the Solicitor General

KIRBY A. HELLER
Attorney

Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether the wire fraud statute, 18 U.S.C. 1343, prohibits the use of interstate wires in the United States to execute a scheme to defraud a foreign government of tax revenue.

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OPINIONS BELOW

The opinion of the en banc court of appeals (Pet. App. 1a-37a) is reported at 336 F.3d 321. The opinion of the panel (Pet. App. 38a-53a) is reported at 305 F.3d 291.

JURISDICTION

The judgment of the court of appeals was entered on July 18, 2003. On September 29, 2003, Chief Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including November 15, 2003, and the petition was filed on November 14, 2003. The petition for a writ of certiorari was granted on April 5, 2004. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

Following a jury trial in the United States District Court for the District of Maryland, petitioners David and Carl Pasquantino were convicted of six counts of wire fraud, in violation of 18 U.S.C. 1343. Petitioner Arthur Hilts was convicted of one count of wire fraud, in violation of 18 U.S.C. 1343. David and Carl Pasquantino were sentenced to 57 months of imprisonment, to be followed by three years of supervised release; Hilts was sentenced to 21 months of imprisonment, to be followed by two years of supervised release. A panel of the court of appeals reversed petitioners' convictions. Pet. App. 39a-53a. The en banc court of appeals vacated the panel decision and affirmed petitioners' convictions. *Id.* at 1a-37a.

1. Between 1996 and 2000, petitioners smuggled large quantities of liquor into Canada. Pet. App. 2a. Petitioners' scheme deprived the government of Canada and the Province of Ontario of more than $3 million in excise duties and tax revenue. J.A. 104-105. To execute the scheme, petitioners David and Carl Pasquantino, while in New York, would telephone discount liquors stores in Maryland and place orders for low-end liquor; petitioner Hilts and others would pick up the liquor in rental trucks and drive it to New York for storage; and, finally, one of petitioners' drivers would then smuggle a quantity of the liquor across the Canadian border. Pet. App. 2a-3a.

Petitioners used fraudulent means to accomplish their scheme. Petitioners' smugglers concealed the liquor in the trunk of the vehicles that carried the liquor into Canada. Pet. App. 3a. In response to questions by a Canadian border official asking petitioners' smugglers what goods they were bringing into the country, the

smugglers failed to state that they were bringing in liquor. *Id.* at 18a. When Canadian officials directed petitioners' smugglers to a secondary inspection area for an examination of their cars, the drivers would instead drive off into the interior of Canada. *Id.* at 3a; J.A. 68-69.

Imported alcohol is heavily taxed by Canada. Canada imposes a federal excise tax, a federal sales tax, a Liquor Control Board tax, and a provincial sales tax. Pet. App. 4a; J.A. 65. In total, the Canadian taxes on a case of alcohol purchased in the United States amount to nearly twice its purchase price. Pet. App. 4a; J.A. 65-66. For example, if alcohol is purchased for $56 per case in the United States, the Canadian taxes would be approximately $100 per case. *Ibid.*

2. A federal grand jury returned an indictment charging petitioners with "devis[ing] and intend[ing] to devise a scheme and artifice to defraud the governments of Canada and the Province of Ontario of excise duties and tax revenues relating to the importation and sale of liquor." Pet. App. 58a. Each of the wire fraud counts was based on a telephone call between New York and Maryland. *Id.* at 60a-64a.

In a pretrial motion to dismiss the indictment, petitioners argued that, in light of the common law revenue rule, a scheme to defraud a foreign government of tax revenue is not cognizable under the wire fraud statute. The district court denied the motion. J.A. 47-62. After a trial, the jury found petitioners Carl and David Pasquantino guilty on all six counts of the indictment. Pet. App. 4a-5a. The district court dismissed all but one of the counts against petitioner Hilts before it submitted the case to the jury, and the jury found Hilts guilty on the remaining count. *Id.* at 5a.

3. A divided panel of the court of appeals reversed petitioners' convictions. Pet. App. 38a-53a. The panel held that a scheme to defraud a foreign government of tax revenue is not cognizable under the wire fraud statute. *Id.* at 39a. The panel reasoned that, while Canada's right to tax revenue is a property right under the wire fraud statute, the common law revenue rule bars a court from recognizing that property right. *Id.* at 43a-44a.

The court of appeals granted the government's request for rehearing en banc and affirmed petitioners' convictions. Pet. App. 1a-37a. The court first held that, because the wire fraud statute, on its face, reaches schemes to defraud a foreign government of tax revenue, such conduct could fall outside that statute only if there were, at the time of the statute's enactment, a well-established common law rule prohibiting the courts of one sovereign from recognizing the existence of the revenue laws of a foreign sovereign. *Id.* at 6a (citing *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991)). The court held that the proper formulation of the common law revenue rule did not have that broad a reach. The court relied on the Restatement (Third) of Foreign Relations Law of the United States (1987), which states that "[c]ourts in the United States are not required to recognize or to enforce judgments for the collection of taxes, fines, or penalties rendered by the courts of other states." *Id.* at 6a (quoting Restatement (Third), § 483). The court emphasized that the common law rule is "permissive" rather than "mandatory," and it "pertains to the nonenforcement of foreign tax judgments as opposed to the nonrecognition of foreign revenue laws." *Id.* at 11a.

The court of appeals also rejected petitioners' argument that affirming their convictions would be the

"functional equivalent" of enforcing the revenue laws of Canada and the Province of Ontario. Pet. App. 13a. The court concluded that a prosecution under the federal wire fraud statute does not enforce any tax judgment or claim of a foreign sovereign. *Ibid.* Instead, "such prosecution seeks only to enforce the federal wire fraud statute for the singular goal of vindicating our government's substantial interest in preventing our nation's interstate wire communication systems from being used in furtherance of criminal fraudulent enterprises." *Id.* at 13a-14a. The court also concluded that petitioners' convictions do not raise separation-of-powers concerns because "Congress enacted the wire fraud statute and the United States Attorney, acting on behalf of the United States as directed by the Executive Branch, made the decision to seek the [petitioners'] indictment thereunder." *Id.* at 14a.

The en banc court, like the panel, also held that, contrary to petitioners' contention, a foreign government's right to tax revenue constitutes a property right under the wire fraud statute, as required under *Cleveland* v. *United States*, 531 U.S. 12 (2000).[1] The court reasoned that "because a government has a property right in tax revenues when they accrue, * * * the tax revenues owed Canada and the Province of Ontario by reason of the [petitioners'] conduct in the present case constitute property for purposes of the wire fraud statute." Pet. App. 16a (citing *United States* v. *Brewer*, 528 F.2d 492,

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[1] *Cleveland* interpreted the mail fraud statute, 18 U.S.C. 1341, but because "[t]he mail and wire fraud statute share the same language in relevant part," this Court "appl[ies] the same analysis to both * * * offenses." *Carpenter* v. *United States*, 484 U.S. 19, 25 n.6 (1987).

495 (4th Cir. 1975)). The court noted that this Court, in holding that unissued video poker licences were not "property" in the hands of the State, had "conspicuously pointed out that the government in that case had 'nowhere allege[d] that Cleveland defrauded the State of any money to which the State was entitled by law.'" Pet. App. 16a (quoting *Cleveland*, 531 U.S. at 22). In this case, the court observed, the government had made such an allegation. Pet. App. 16a.

Judge Gregory, joined by Judge Michaels, dissented. Pet. App. 27a-37a. The dissent concluded that the revenue rule not only bars enforcement of a foreign government's revenue laws, but also any recognition of such laws. *Id.* at 31a. Because the indictment in this case alleged the existence of Canada's tax laws, and because petitioners' sentences depended on the amount of Canada's tax loss, the dissenters concluded that the revenue rule barred the government's prosecution. *Id.* at 35a-36a.

SUMMARY OF ARGUMENT

A. The wire fraud statute prohibits "any" scheme to defraud that is executed through interstate wires. There is no exception to that categorical prohibition based on the identity of the victim or the nature of the money or property that is the object of the fraud. The language of the wire fraud statute therefore prohibits the use of interstate wires to execute a scheme to defraud a foreign government of tax revenue.

B. The common law revenue rule has no application to criminal prosecutions under the wire fraud statute. That common law principle prevents a foreign government or someone acting on its behalf from using the courts in this country to collect money due under the foreign government's tax laws. A prosecution under

the wire fraud statute is not brought on behalf of the foreign government, and it does not seek to enforce a claim to tax revenue. The prosecution neither satisfies nor eliminates any tax obligation the defendant may owe to a foreign government. Instead, such a prosecution is brought on behalf of the United States and its objective is to vindicate this country's interest in preventing interstate wires from being used to execute a scheme to defraud. Such a prosecution therefore does not implicate the common law revenue rule.

C. In order to prove a scheme to defraud a foreign government of tax revenue, the government must establish the existence of foreign tax laws that require the payment of taxes. Such a recognition of foreign tax laws does not violate the common law revenue rule. The common law revenue rule bars direct or indirect *enforcement* of a foreign government's tax claim; it does not bar *recognition* of foreign revenue laws as an incident of the Executive Branch's exercise of its sovereign power to enforce a federal criminal prohibition.

D. The purposes of the revenue rule are to prevent a foreign government from asserting its sovereignty in this country and to relieve courts of the need to make sensitive policy judgments on which foreign tax claims should be enforced and which should not. A wire fraud prosecution for a scheme to defraud a foreign government of tax revenue does not violate either of those policies. Such a prosecution is not the product of a foreign sovereign's assertion of authority; it is the product of an assertion of United States sovereignty over criminal conduct occurring here. Moreover, courts that preside over wire fraud prosecutions are not required to make sensitive judgments about which prosecutions promote United States policy and which

do not. Those judgments are entrusted to the Executive Branch.

E. A scheme to defraud a foreign government of tax revenue satisfies the wire fraud statute's "money or property" requirement. Common law fraud includes the deprivation of money or property that is legally due to the victim. Depriving a foreign government of money legally due under its tax laws falls squarely within that established common law understanding. Indeed, early federal customs statutes used the term "defraud" to refer to schemes to deprive the government of tax revenue.

Cleveland v. *United States*, 531 U.S. 12 (2000), is consistent with that established common law understanding. In that case, the Court held that a scheme to obtain a state video poker licence did not involve a deprivation of money or property because the State had a regulatory rather than a property interest in the license. Crucial to the Court's analysis was that the government had not alleged that the defendant deprived the State of money to which it was legally entitled. *Id.* at 18. Prosecutions of schemes to deprive a government of tax revenue involve precisely such an allegation. They therefore satisfy the wire fraud statute's money or property requirement.

F. Neither the smuggling statute nor the United States-Canada Revised Protocol bars a wire fraud prosecution for defrauding a foreign government of tax revenue. The government may not prosecute conduct under the smuggling statute unless the smuggling offense occurs in a country with a reciprocal prohibition. The wire fraud statute, however, does not contain such a limitation, and nothing in the smuggling statute purports to introduce that element into the later enacted wire fraud statute. The United States-Canada

Revised Protocol specifies the circumstances under which the United States will give assistance to Canada in collecting tax revenue. Because a prosecution under the wire fraud statute is not intended as a surrogate means of assisting Canada in collecting its tax revenue, the Revised Protocol has no application here.

ARGUMENT

THE WIRE FRAUD STATUTE PROHIBITS THE USE OF INTERSTATE WIRES TO EXECUTE A SCHEME TO DEFRAUD A FOREIGN GOVERNMENT OF TAX REVENUE

While residing in this country, petitioners devised a scheme to smuggle liquor into Canada and defraud Canada and the Province of Ontario of the taxes owed on the liquor. Petitioners executed that scheme by using interstate wires in this country for the purpose of ordering the liquor necessary for the scheme. That conduct plainly constituted a scheme to defraud in violation of the wire fraud statute. Neither the common law revenue rule, nor petitioners' efforts to take their conduct outside of the scope of a money-or-property fraud, nor other federal law addressing other circumstances, justifies reading an exception into the wire fraud statute that would immunize petitioners' conduct from a federal wire fraud prosecution.

A. The Text Of The Wire Fraud Statute Covers Schemes To Defraud A Foreign Government Of Tax Revenue

The wire fraud statute prohibits "*any* scheme or artifice to defraud" where interstate wires are used "for the purpose of executing such scheme or artifice." 18 U.S.C. 1343 (emphasis added). The term "any" is all-inclusive. *United States* v. *Gonzales*, 520 U.S. 1, 5 (1997). It means that the wire fraud statute applies to

all schemes to defraud that are executed through interstate wires, regardless of the identity of the victim or the nature of the money or property that is the object of the fraud. The text of the wire fraud statute does not exempt schemes to defraud foreign or governmental entities, and it contains no exception for schemes to deprive such entities of tax revenue. Indeed, the statute expressly prohibits schemes to defraud through the use of wires in "foreign commerce," 18 U.S.C. 1343, and thus contemplates that foreign entities may be victims of wire fraud. As long as the defendant has devised a "scheme to defraud" and has used interstate wires to execute that scheme, a violation of the wire fraud statute has occurred.

Consistent with the statute's text, courts have recognized that the wire fraud statute and the similarly-worded mail fraud statute (18 U.S.C. 1341) apply to schemes to defraud foreign governments, foreign corporations, and foreign individuals. *United States* v. *Sensi*, 879 F.2d 888, 892 (D.C. Cir. 1989) (scheme to defraud government-owned foreign corporation); *United States* v. *Van Cauwenberghe*, 827 F.2d 424, 426 (9th Cir. 1987) (scheme to defraud foreign individual and foreign corporation), cert. denied, 484 U.S. 1042 (1988); *United States* v. *Gilboe*, 684 F.2d 235, 237-238 (2d Cir. 1982) (scheme to defraud foreign government), cert. denied, 459 U.S. 1201 (1983). The courts of appeals that have addressed the question have also uniformly held that the wire and mail fraud statutes apply when the object of a fraudulent scheme is to deprive a domestic governmental entity of tax revenue. *United States* v. *Goulding*, 26 F.3d 656, 663 (7th Cir.) (federal taxes), cert. denied, 513 U.S. 1061 (1994); *United States* v. *Dale*, 991 F.2d 819, 849 (D.C. Cir.) (per curiam) (federal taxes), cert. denied, 510 U.S. 1030 (1993);

United States v. *Helmsley*, 941 F.2d 71, 94 (2d Cir. 1991) (state taxes), cert. denied, 502 U.S. 1091 (1992); *United States* v. *Melvin*, 544 F.2d 767, 773 (5th Cir.) (state taxes), cert. denied, 430 U.S. 910 (1977); *United States* v. *Brewer*, 528 F.2d 492 (4th Cir. 1975), (state taxes); *United States* v. *Mirabile*, 503 F.2d 1065, 1066-1067 (8th Cir. 1974) (state taxes), cert. denied, 420 U.S. 973 (1975).

The same textual analysis applies equally when the two elements are combined: the text of the wire fraud statute covers schemes to defraud that involve a foreign government as the victim, and tax revenue as the object of the fraud. The court below and the Second Circuit have correctly so held. See Pet. App. 12a; *United States* v. *Trapilo*, 130 F.3d 547, 551 (1997).[2]

B. The Revenue Rule Is Not Implicated By A Criminal Wire Fraud Prosecution Because Such A Prosecution Seeks to Vindicate The United States' Sovereign Interest In Punishing Criminal Conduct In This Country, Not The Foreign Government's Interest In Revenue Collection

Petitioners argue that, in light of the common law revenue rule, schemes to defraud a foreign government of tax revenue are not cognizable under the wire fraud statute. Pet. Br. 9-27. In particular, they argue that the revenue rule immunizes their conduct because (1) the wire fraud statute was enacted against the backdrop of the common law revenue rule, (2) the common law revenue rule bars criminal prosecutions of schemes

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[2] While the First Circuit in *United States* v. *Boots*, 80 F.3d 580, cert. denied, 519 U.S. 905 (1996), held that the revenue rule bars a prosecution based on a scheme to defraud a foreign government of tax revenue, that court did not dispute that such a scheme falls within the literal language of the wire fraud statute.

to defraud a foreign government of tax revenue, and (3) the wire fraud statute does not expressly abrogate that common law principle and therefore incorporates it. See *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991) ("where a common-law principle is well established, * * * the courts may take it as given that Congress has legislated with an expectation that the principle will apply except 'when a statutory purpose to the contrary is evident.'"). Petitioners' reliance on the revenue rule is misplaced. At the time the wire fraud statute was enacted, there was no well established common law principle —under the revenue rule or otherwise—that barred a domestic criminal prosecution of a scheme to defraud a foreign government of tax revenue. The wire fraud's prohibition against "any" scheme to defraud therefore authorizes such a prosecution, and "the common law revenue rule, inapplicable to the instant case, provides no justification for departing from the plain meaning of the statute." *Trapilo*, 130 F.3d at 551.

1. The Revenue Rule's Core Principle Bars A Foreign Sovereign From Pursuing Its Tax Claims In This Country's Courts

At its core, the revenue rule prevents a foreign sovereign from filing suit in this country to recover money due under its tax laws. See *Attorney Gen. of Canada* v. *R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 109 (2d Cir. 2001) ("courts of one sovereign will not enforce the tax judgments or unadjudicated tax claims of other sovereigns"), cert. denied, 537 U.S. 1000 (2002); *Republic of Honduras* v. *Philip Morris Companies, Inc.*, 341 F.3d 1253, 1256 (11th Cir. 2003) (revenue rule "prevents the courts of one sovereign from enforcing or adjudicating tax claims from another

sovereign"), cert. denied, 124 S. Ct. 1075 (2004); *Her Majesty the Queen in Right of the Province of British Columbia* v. *Gilbertson*, 597 F.2d 1161, 1163 n.1 (9th Cir. 1979) (revenue rule "prevents a foreign jurisdiction from either instituting a suit to recover taxes" or "to enforce its own court's judgment for taxes"); *United States* v. *Harden*, [1963] S.C.R. 366, 370 (Sup. Ct. Can.) (under revenue rule "courts will not collect the taxes of foreign States for the benefit of the sovereigns of those foreign States"); *Peter Buchanan Ltd.* v. *McVey*, [1955] A.C. 516, 526 (Ir. H. Ct. 1950) ("courts of [one] country will not enforce the revenue claims of a foreign country in a suit brought for [that] purpose by a foreign public authority or the representative of such an authority"), aff'd, [1955] A.C. 530 (Ir. S. C. 1951).[3] That core principle has no application to a criminal prosecution under the wire fraud statute. Such prosecutions are brought by the United States to enforce a prohibition against criminal conduct occurring in this country. They are not brought by foreign governments, and they do not seek to recover taxes due under foreign tax law. Indeed, the prosecution in no way affects the extent

[3] Not all sources accept that strong form of the rule. The Restatement (Third) of the Foreign Relations Law of the United States § 483 states that "[c]ourts in the United States are not required to recognize or to enforce judgments for the collection of taxes * * * * rendered by the courts of other states." Restatement (Third) 611. The comment to that section states that "[n]o rule of United States law or of international law would be violated if a court in the United States enforced a judgment of a foreign court for payment of taxes * * * that was otherwise consistent with" the general standards for enforcing judgments. *Ibid* (Cmnt. a). The Restatement (Second) of Conflict of Laws, § 89(b) (1971) expresses no opinion on "whether, in situations not covered by treaty, an action by a foreign nation on a claim for taxes will be entertained in the United States."

to which petitioners may owe taxes to the Canadian government. Thus, the revenue rule's core common law formulation does not assist petitioners in resisting their prosecution for wire fraud.

2. The Ancillary Principles Drawn From The Revenue Rule Also Do Not Bar Criminal Prosecutions By The United States

The revenue rule not only bars a foreign government from *directly* asserting claims to unpaid taxes based directly on foreign tax law. It also reaches *indirect* efforts by a foreign government to use our courts to collect its tax revenues. There are two kinds of suits that have been recognized to fall into that category.

First, the revenue rule applies to cases where a foreign government asserts a claim based on a contract or tort theory, rather than directly under its tax law, but the objective of the suit remains to collect taxes due under foreign law. For example, in *Harden*, the United States brought suit in Canada based on a contract theory, but the underlying contract reflected an agreement to pay the taxes due under United States law. In reliance on the revenue rule, the Supreme Court of Canada refused to entertain the suit. 1963 S.C.R. at 371. Similarly, in *Attorney Gen. of Canada*, Canada brought suit under the provisions for private enforcement of the RICO statute, but the object of Canada's action was to collect its lost tax revenue. The Second Circuit held that Canada's civil RICO suit was barred by the revenue rule. 268 F.3d at 130-134.

Second, the revenue rule has been held applicable where a *private* party asserts a claim that does not rest on foreign tax law, but the entire object of the suit is to recover taxes for the foreign government. *Peter Buchanan, Ltd.* is an example. There, a private liquidator brought suit to recover assets of an estate, but the liquidator was acting at the behest of a foreign sovereign, and the entire purpose of the suit was to recover taxes for that government. The court held that the revenue rule barred the liquidator's suit. 1955 A.C. at 527, 530. A critical fact was that the right in question was "being enforced at the instigation of a foreign authority." *Id.* at 527.

Both lines of cases involve two crucial elements: a foreign government or someone acting on its behalf brings the suit; and the object of the suit is to vindicate the foreign sovereign's interest in collecting tax revenue. Suits with those features are substantively indistinguishable from suits by foreign governments that seek to collect taxes based on foreign tax law. Such "indirect enforcement" is prohibited because "a foreign State cannot be allowed to do indirectly what it cannot do directly." 1 *Dicey & Morris, The Conflict of Laws* 90 (2000) (*Dicey & Morris*).[4]

The situation is fundamentally different in a prosecution under the wire fraud statute that charges a scheme to defraud a foreign government of tax revenue. In

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[4] For that reason, the United States, in its amicus brief filed at the Court's invitation at the petition stage in *Attorney General of Canada*, took the position that the revenue rule barred Canada's claim under the civil RICO provisions. 01-1317 U.S. Br. at 11-13. The government accepted that the civil RICO provisions were drafted against the backdrop of the common law revenue rule and that Congress expected that it would therefore apply, *id.* at 11 (citing *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 108 (1991)), but the government explicitly distinguished criminal prosecutions like this one from Canada's civil suit because "criminal prosecutions vindicate the interests of the United States" and are brought by the Executive Branch on its own behalf, not on behalf of a foreign government and not to further that government's interest in collecting its taxes. *Id.* at 15-16.

such a prosecution, neither of the elements that trigger application of the revenue rule is present. First, the United States brings a wire prosecution on its own behalf, not on behalf of a foreign government. Second, it seeks to vindicate the United States' sovereign interest in preventing the wires from being used to further a scheme to defraud, not a foreign sovereign's interest in collecting tax revenue. As the court of appeals in this case explained, a prosecution under the wire fraud statute "does nothing civilly or criminally to enforce any tax judgments or claims that the foreign sovereign has or may later obtain against the defendant." Pet. App. 13a. Instead, such a prosecution "seeks only to enforce the federal wire fraud statute for the singular goal of vindicating our government's substantial interest in preventing our nation's interstate wire communication systems from being used in furtherance of criminal fraudulent enterprises." *Id.* at 13a-14a.

Thus, in bringing a criminal wire fraud prosecution, the United States pursues its own sovereign interest as an independent government, and does not act as the agent of a foreign nation seeking to pursue its revenue claims. Accordingly, a wire fraud prosecution does not provide a foreign government with an indirect route to achieve indirectly what it is forbidden from achieving directly by the revenue rule. Petitioners have not pointed to any cases predating enactment of the wire fraud statute that provide a basis for reaching a different conclusion.[5]

[5] Petitioners rely primarily on the two lines of cases discussed above. Pet. Br. 19-20. They also cite (*id.* at 18) a set of cases holding that a contract to supply goods to be smuggled into another country is enforceable. *E.g.*, *Holman* v. *Johnson*, 98 Eng. Rep. 1120 (K.B. 1775); *Boucher* v. *Lawson*, 95 Eng. Rep. 53 (K.B. 1734). Those rulings reflect a policy judgment that such contracts promote commerce. *Id.* at 55-56. Other courts have refused to apply the revenue rule in similar circumstances. See William Dodge, *Breaking the Public Law Taboo*, 43 Harv. Int'l L.J. 161, 178 (2002) (discussing *Foster* v. *Driscol*, [1929] 1 K.B. 470 and *Regazzoni* v. *K.C. Sethia*, [1956] 2 Q.B. 490)); *id.* at n.116 (citing *Bhagwandas* v. *Brooks Exim Pte Ltd.*, [1994] 2 Sing. L. Rep. 431 (H.Ct.) (Sing.) and *Ralston Purina Co.* v. *McKendrick*, 850 S.W.2d 629, 639 (Tex. App. 1993)). Accordingly, there is no firmly established common law rule governing such cases. In any event, cases that address the enforceability of private contracts and that are based on a perceived interest in promoting commerce are not instructive on the question whether the revenue rule applies when the United States seeks to vindicate its sovereign interest in preventing interstate wires from being used to promote fraudulent schemes.

C. A Wire Fraud Prosecution Alleging A Scheme To Defraud A Foreign Government Of Tax Revenue Requires A Court To Recognize Foreign Tax Law, But Such Recognition Does Not Implicate The Revenue Rule

1. In a prosecution that alleges a scheme to defraud a foreign government of tax revenue, the government must prove the existence of foreign tax laws. A wire fraud prosecution requires proof of a scheme to deprive the victim of money or property, *McNally* v. *United States*, 483 U.S. 350, 356 (1987), and the existence of foreign tax laws requiring the payment of tax revenue must be proved in order to show that the scheme is aimed at depriving the government of money or property. See *United States* v. *Pierce*, 224 F.3d 158, 165-166 (2d Cir. 2000); see also pp. 28 to 33, *infra*. Such recognition of foreign tax laws as an incident of enforcing the wire fraud statute does not implicate the revenue rule.

Some early English cases characterized the revenue rule in dicta as forbidding any recognition of foreign

revenue laws. See *e.g.*, *Holman* v. *Johnson*, 98 Eng. Rep. 1120, 1121 (K.B. 1775) ("no country ever takes notice of the revenue laws of another"). But those cases overstated the scope of the rule. The revenue rule "relates only to *enforcement*, but it does not prevent *recognition* of a foreign [revenue] law." *Dicey & Morris*, 90; *Peter Buchanan, Ltd.*, 1955 A.C. at 523; *Regazzoni*, 2 Q.B. at 515-516; *Attorney Gen. of Canada*, 268 F.3d at 133-134. For example, a court will grant a foreign government's application to gather evidence for use in a foreign tax proceeding. *Attorney Gen. of Canada*, 268 F.3d at 133. A court will not restrain a trustee from complying with foreign fiscal obligations. *Dicey & Morris*, at 91. And a court will indemnify a trustee for money the trustee was legally compelled to pay in satisfaction of a tax liability even though the tax claim could not itself be enforced. *Ibid.* The common element is that such suits require recognition of foreign law, but they do not require enforcement of a foreign government's claim to tax revenue.

The situation is the same here. In a wire fraud prosecution, a court recognizes the existence of foreign revenue laws for the purpose of enforcing the wire fraud statute's categorical prohibition against "any" scheme to defraud executed through interstate wires, not for the purpose of enforcing, directly or indirectly, a foreign government's claim to tax revenue.

2. The district court's reliance on Canadian tax law (Pet. Br. 26) to determine the amount of loss for sentencing purposes also involves recognition rather than enforcement of a foreign revenue law. The Sentencing Guidelines incrementally increase the offense level for fraudulent conduct based on the amount of loss suffered by the victim. See Sentencing Guidelines § 2B1.1(b)(1) (replacing Guidelines § 2F1.1(b)(1)). That

amount-of-loss Guideline reflects a policy unrelated to enforcement of any revenue law—that a defendant's sentence should depend on the extent of the harm he has caused to the victim of his crime. The district court's reliance on Canadian tax law to determine the amount of the loss therefore does not enforce that law; instead, it recognizes it for the purpose of enforcing the Guidelines policy that a defendant's sentence should reflect the extent of the harm that he has caused. See *United States* v. *Chimielewski*, 218 F.3d 840, 843 (8th Cir. 2000) ("we consider a foreign loss not to uphold a foreign law, but to uphold our own law, U.S.S.G § 2F1.1, which directs us to consider the loss caused by fraud as a measure of a just punishment").[6]

3. Petitioners argue (Pet. Br. 26) that the federal criminal code's provision for mandatory restitution to a victim of an offense demonstrates that this prosecution enforced Canada's revenue laws. That issue is not directly presented in this case, and, in any event, petitioner's claim is unfounded.

The restitution provision instructs a court to order restitution to the victim of, *inter alia*, "an offense against property, * * * including any offense committed by fraud or deceit." 18 U.S.C. 3663A(a)(1), (c)(1)(A)(ii). The government did not urge the district court to order restitution in this case on the theory that it was not "appropriate * * * since the victim is a foreign government and the loss derives from tax laws

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[6] Petitioner did not raise in either the district court or in the court of appeals a claim that the district court's determination of the amount of loss in this case violated the Sixth Amendment. Nor is that issue within the question presented. Accordingly, petitioners' current assertion (Pet. Br. 26 n.29) that their sentences must be vacated in light of *Blakely* v. *Washington*, 124 S. Ct. 2531 (2004), is not properly presented here.

of the foreign government." J.A. 106. Consistent with that recommendation, the district court did not order restitution. J.A. 129-130. Thus, petitioners are in no position to claim that any provision for restitution converted this case into an indirect suit for Canadian taxes that would implicate the revenue rule. The applicability of the restitution provision is simply not at issue in this case.

Petitioners claim that the United States had no authority to "pick and choose" which provisions of the criminal code would apply to petitioners' conduct, and, had the prosecutor proceeded as required by law and sought restitution, it would have been clear that prosecution under the wire fraud statute was an effort to collect on a foreign sovereign's tax claim. Pet. Br. 26. But even if restitution had been sought and ordered, that would not support the conclusion that prosecution for wire fraud would be barred.

It is far from clear that restitution to a foreign government should be regarded as an indirect substitute for a suit by the foreign government itself seeking to recoup tax loss. While victims have certain limited rights in the restitution process,[7] restitution

[7] The victim has the right to appear although not necessarily the right to present evidence, and cannot seek a judgment (in the criminal case) on his own behalf. 18 U.S.C. 3664(d)(2) requires the probation officer to obtain information from the victims for the presentence report and gives the victims certain other rights. Under subsection (5), the victim can petition the court for an amended restitution order if it discovers additional losses. The government has to consult with the victims before sentencing, to the extent practicable, so that it can provide the probation officer with a listing of amounts subject to restitution. 18 U.S.C. 3664(d)(1). Enforcement of restitution is primarily by the United States, which can enforce victim restitution orders in the same manner that it recovers fines and in accordance with the practices

remains a criminal punishment that is imposed as part of the sentence for an offense. As this Court has explained, restitution imposed as part of a criminal sentence is a "penal" sanction despite its additional function to reimburse a victim for loss. *Kelly* v. *Robinson* 479 U.S. 36, 52 (1986). Seen in that light, restitution is a punishment that fulfills the domestic criminal law's aims, once the United States, as sovereign, has made an independent decision to prosecute. A foreign government, such as Canada, cannot directly or indirectly initiate that process.

But even if criminal restitution were thought to fall within the scope of the revenue rule, the proper solution would be to interpret the restitution provision itself against the backdrop of the revenue rule and hold that Title 18 of the United States Code lacks the direct statement necessary to authorize an award of restitution that would otherwise be barred by the common law principle. Cf. *Astoria Fed. Sav. & Loan Ass'n*, *supra*; *United States* v. *Texas*, 507 U.S. 529, 534 (1993) ("In order to abrogate a common-law principle, the statute must 'speak directly' to the question addressed by the common law." (citation omitted)). There is no justification for going further and precluding prosecution altogether, thereby providing a safe haven for defendants like petitioners who violate the wire fraud statute

and procedures for the enforcement of a civil judgment under Federal or state law. 18 U.S.C. 3613. See 18 U.S.C. 3613A, 3614 (authorizing sanctions for defaulting on payment of restitution). There is one provision that gives the victim a mechanism for enforcing the restitution order. 18 U.S.C. 3664(m)(1)(B) (authorizing issuance and registration of an abstract of judgment, which can be made a lien on the defendant's property). See generally *United States* v. *Phillips*, 303 F.3d 548 (5th Cir. 2002), cert. denied, 537 U.S. 1187 (2003).

by engaging in schemes on United States soil aimed at defrauding foreign governments of tax revenue.

D. The Policies That Underlie The Revenue Rule Do Not Justify Its Application To A Criminal Prosecution For Wire Fraud

Courts have articulated both separation-of-powers and judicial competence rationales for the revenue rule. Neither provides a basis for extending the rule to bar a criminal prosecution commenced by the Executive Branch.

1. Separation-of-Powers Concerns Do Not Justify Application Of The Revenue Rule To A Wire Fraud Prosecution

Courts have offered two separation-of-powers justifications for the revenue rule. First, courts have stated that the revenue rule prevents sovereigns from asserting their sovereignty within the borders of other countries, helping nations to maintain peaceful relations. *Attorney Gen. of Canada*, 268 F.3d at 111; *Gilbertson*, 597 F.2d at 1165; *Government of India* v. *Taylor*, [1955] A.C. 491, 511. Second, courts have stated that the revenue rule relieves courts of the need to perform the sensitive task of deciding which foreign revenue laws should be enforced and which should not. *Attorney Gen. of Canada*, 268 F.3d at 112; *Gilbertson*, 597 F.2d at 1164-1165; *Peter Buchanan*, 1955 A.C. at 528-529.

Criminal prosecutions under the wire fraud statute do not transgress either of those polices. As discussed above, see p. 16, such a prosecution is not the product of a foreign sovereign's assertion of authority within this country; it is the product of an assertion of United States sovereignty over criminal conduct occurring here. The Executive, acting through federal prosecutors, makes the decision to prosecute when it concludes that fraudulent behavior directed at foreign tax authorities warrants punishment, in order to prevent this country from being the home base for criminals.

Such domestic criminal conduct may have a host of adverse ramifications. The profits from such conduct may fund other criminal schemes at home or abroad. The transnational collaboration of criminals to accomplish such schemes may lead to the development of international criminal organizations that elude any single nation's ability to detect and prosecute. The conduct of such criminal schemes may provide a training ground for similar operations that are later launched against domestic victims. And the existence of criminals operating at large here may irritate foreign relations if the United States allows victimization of other nations to go unpunished. While a categorical bar on Executive Branch prosecutions based on foreign taxes would tie the hands of the Executive in dealing with crimes against other nations, a sound exercise of prosecutorial discretion can reflect consideration of the nature of foreign tax systems, issues of reciprocity, and broader diplomatic interests. All of those considerations explain why the United States has a prosecutorial interest in bringing such cases, independent of protecting a foreign nation's revenues.

Nor does a wire fraud prosecution put the court in the position of making sensitive policy decisions about the merits of various foreign taxing systems. In a wire fraud prosecution, the court evaluates whether the indictment alleges the essential elements of a wire fraud offense, instructs the jury on the elements of the offense, and determines whether the evidence is sufficient to permit a jury to find that the elements have been proved. But the court is not required to decide

which prosecutions promote United States foreign policy interests and which do not, or which prosecutions accord with United States public policy and which do not. The Executive Branch—the Branch with the preeminent responsibility for the conduct of foreign affairs—makes those determinations in deciding whether to initiate a prosecution.

The Constitution gives the Executive Branch the responsibility to "take Care that the Laws are faithfully executed," U.S. Const. Art. II, § 3, and that responsibility carries with it the power to decide when a criminal prosecution furthers the policy interests of the United States, including foreign policy interests. See *United States* v. *Armstrong*, 517 U.S. 456, 464 (1996). Once the Executive Branch brings such a prosecution, a court has no authority to reject it on public policy grounds. Rather, the court may dismiss the prosecution only if it is legally insufficient under the wire fraud statute or the prosecution transgresses constitutional limitations. See *ibid.*

For that reason, petitioners' rhetorical questions concerning prosecutions based on odious foreign tax systems (Pet. Br. 13 (quoting *Attorney Gen. of Canada*, 268 F.3d at 113)) are properly addressed by the exercise of Executive Branch discretion, unless a particular prosecution is found to be unconstitutional. That process, in which prosecutors can consult with the Department of State and other interested agencies to determine the foreign relations and foreign policy interests of the United States, is the proper mechanism for resolution of these issues—rather than rote application of the common law revenue rule. As the Second Circuit has explained: "When the United States prosecutes a criminal action, the United States Attorney acts in the interest of the United States, and

his or her conduct is subject to the oversight of the executive branch. Thus, the foreign relations interests of the United States may be accommodated throughout the litigation." *Id.* at 123.

In sum, because a court in a wire fraud prosecution is not required to make any sensitive public policy judgments on when a prosecution for defrauding a foreign government of tax revenue is appropriate, and because the Executive Branch is fully competent to make those judgments, the separation-of-powers rationale for the revenue rule has no application here. Indeed, a misapplication of the revenue rule to forbid the United States to initiate a prosecution that served important domestic and foreign relations interests would affirmatively interfere with the proper allocation of power among the branches.

2. Difficulties In Determining Foreign Tax Law Do Not Justify Application Of The Revenue Rule To A Wire Fraud Prosecution

The only other justification offered for the revenue rule is the difficulty of determining foreign law. *Taylor*, 1955 A.C. at 514 (Lord Somervell of Harrow). That difficulty, however, is not a persuasive justification for the revenue rule as a general matter, and it is particularly unpersuasive as a ground for barring a wire fraud prosecution.

Federal courts are fully competent to resolve questions of foreign law. Federal Rules of Criminal Procedure 26.1 provides a specific procedure for determining foreign law, permitting the court to consider "any relevant material or source—including testimony —without regard to the Federal Rules of Evidence." This process is part of a variety of circumstances in which federal courts are required to make determina-

tions of foreign law. As noted (p. 10, *supra*), it is well established that a wire or mail fraud prosecution may be based on a scheme to defraud involving foreign property, which in turn may implicate issues of foreign law. More broadly, federal courts have general criminal jurisdiction in the Canal Zone, Guam, and the Virgin Islands; the law of the demanding state is relevant in an extradition proceeding; foreign law may justify non-compliance with a subpoena; foreign law may be a defense to prosecution; and foreign law may be relevant in prosecutions for kidnapping (18 U.S.C. 1201), transportation of stolen vehicles (18 U.S.C. 2312), and sale or receipt of stolen livestock (18 U.S.C. 2317). See Fed. R. Crim. P. 26.1 (advisory committee notes). See also *United States* v. *McNab*, 331 F.3d 1228, 1239-1248 (11th Cir. 2003) (interpreting and determining the validity of Honduran law in a prosecution under the Lacey Act, 16 U.S.C. 3372(a)(2)(A), which prohibits the importation of "fish or wildlife taken, possessed, transported, or sold in violation of * * * any foreign law"), cert. denied, 124 S. Ct. 1406 (2004).

The government's obligation to prove beyond a reasonable doubt that the defendant has acted with the intent to defraud also means that prosecutions will be brought only when the government has concluded that it is clear that foreign laws required the payment of taxes and the defendants sought to defraud the foreign government of that revenue. In the present case, for example, the government presented uncontradicted evidence that Canada and the Province of Ontario impose taxes on the importation and sale of liquor. Pet. App. 4a. Whatever the difficulty in determining foreign law, however, Rule 26.1 expressly entrusts federal courts with that responsibility. Such difficulties are not

a sound basis for refusing to entertain a wire fraud prosecution.

3. The Common Law Revenue Rule Is Not Subject To Expansion Based On Policy Considerations

Reliance on the traditional policy rationales for the revenue rule to justify its application to a wire fraud prosecution fails for an additional reason. Policy rationales alone cannot justify expanding the revenue rule beyond its established common law scope, particularly in light of the clarity with which the wire fraud statute covers petitioners' conduct. As the court of appeals in this case explained, "a significant separation of powers problem would arise were we to play diplomat from the bench by relying on a novel expansion of the common law revenue rule, no doubt a policy laden rule, to set aside [petitioners'] * * * convictions." Pet. App. 14a.

This Court reached an analogous conclusion in *Kirkpatrick & Co.* v. *Environmental Tectonics Corp. Int'l*, 493 U.S. 400 (1990), with respect to the act of state doctrine. In that case, the Court held that the act of state doctrine applies only when a claim or defense requires a court to declare invalid the official act of a foreign state performed within its own territory. *Id.* at 405-406. The Court rejected the argument that the policies underlying the act of state doctrine—international comity, respect for the sovereignty of foreign nations on their own territory, and the avoidance of embarrassment to the Executive Branch in its conduct of foreign relations—justify an extension of that doctrine to cases where a claim requires a court to make factual findings that suggest that an act of state is invalid. *Id.* at 408-409. The Court explained that the act of state's "underlying policies" are not "a doctrine unto themselves justifying expansion of the act of state

doctrine" into "new and unchartered fields." *Id.* at 409. While in this case neither the common law revenue rule nor its underlying policies stands in the way of a prosecution under the wire fraud act, any suggestion that the revenue rule should be extended to preclude this prosecution must fail.

E. A Scheme To Deprive A Foreign Government Of Tax Revenue Satisfies The Wire Fraud Statute's "Money Or Property" Requirement And Involves Common Law Fraud

In *McNally* v. *United States*, 483 U.S. 350, 358 (1987), the Court held that the term "to defraud" commonly refers to "wronging one in his property rights by dishonest methods or schemes," and usually signifies "the deprivation of something of value by trick, deceit, chicane or overreaching." Based on that understanding, the Court held that the mail fraud statute reaches only deprivations of "money or property." *Id.* at 359; see *id.* at 360. In *Carpenter* v. *United States*, 484 U.S. 19 (1987), the Court interpreted the wire fraud statute to impose the same requirement. Noting that the wire fraud statute has the same relevant language as the earlier enacted mail fraud statute, *id.* at 25 n.6, the Court held that both statutes are limited to schemes "to deprive another of money or property." *Id.* at 27. See *Cleveland* v. *United States*, 531 U.S. 12, 26 (2000) (reaffirming *McNally*).[8]

Schemes to defraud a foreign government of tax revenue satisfy the wire fraud statute's "money or property" requirement. Such a scheme seeks "to deprive" the foreign government "of money" due under that government's tax laws.

[8] Between *Carpenter* and *Cleveland*, Congress amended the mail and wire fraud statutes to cover "the intangible right of honest services." 18 U.S.C. 1346. In all other circumstances, the money or property requirement remains intact.

1. The Common Law Defined Fraud To Include Schemes To Deprive A Victim of Money Legally Due

Petitioners contend that a scheme to defraud a foreign government of tax revenue does not satisfy the money or property requirement because the defendant in such a scheme does not seek to obtain from the government money or property already in the government's possession. Pet. Br. 30, 35. But, in accordance with its common law antecedents, the wire fraud statute covers any scheme to deprive a victim of money or property that is legally due to the victim. A scheme to deprive a government of revenue due under its tax laws is an example of such a fraudulent scheme. That understanding of the term "defraud" was well established by the time the mail fraud statute was first enacted in 1872.

One legal dictionary of that era stated that "to defraud is to withhold from another that which is justly due to him." 1 *Bouvier's Law Dictionary* 530 (1897); accord William Anderson, *A Dictionary of Law* 474 (1893) (defining "defraud" as "to withhold from another what is justly due him"). Thus, if an insolvent debtor entered into an agreement with his creditors that they would accept a proportion of payment on his debts in satisfaction of the whole, but he then reached a secret agreement with a particular creditor that would give him an advantage over the others, it was regarded as common law fraud. 1 Stewart Rpalje & Robert Lawrence, *A Dictionary of American and English Law* 546 (1883). Similarly, at that time, it constituted common law fraud if a woman, after entering into a contract to marry, secretly conveyed her property in order to

defeat her prospective husband's marital right to the property. *Ibid.* As those examples demonstrate, common law fraud includes schemes to deprive the victim of money or property to which the victim was, or would become, legally entitled. Schemes to defraud a government of tax revenue fit within that common law tradition.

Indeed, by the time of the enactment of the mail fraud statute, the term "defraud" had long been understood to encompass schemes to deprive a government of tax revenue. A statute enacted by the First Congress subjected to forfeiture goods entered into the country not invoiced according to their actual value "with design to defraud the revenue." Act of July 31, 1789, ch. 5, § 22, 1 Stat. 42. Similarly, the First Congress subjected to forfeiture packages of goods that were misidentified "with intention to defraud the revenue." § 23, 1 Stat. 43. In 1874, Congress authorized criminal prosecution of persons who enter goods "with intent to defraud the revenue" and "deprive[]" the United States of "lawful duties." Act of June 22, 1874, ch. 391, § 12, 18 Stat 186. And an early decision under that statute held that "the United States is deprived of duties the moment it becomes entitled to them and they are withheld by the importer." *United States* v. *Boyd*, 24 F. 692, 694 (C.C.S.D.N.Y. 1885). Against that background, the courts of appeals that have addressed the question have all held that a scheme to deprive the United States or a State of tax revenue satisfies *McNally*'s money or property requirement. *Fountain* v. *United States*, 357 F.3d 250, 257 (2d Cir. 2004); *United States* v. *Bucey*, 876 F.2d 1297 (7th Cir.), cert. denied, 493 U.S. 1004 (1989); *United States* v. *Herron*, 825 F.2d 50, 56 (5th Cir. 1987); *Brewer*, 528 F.2d at 495.

This Court's decision in *Manning* v. *Seeley Tube & Box Co.*, 338 U.S. 561 (1950), further supports that conclusion. In that case, the Court held that a taxpayer was required to pay interest on an assessed tax deficiency. The Court explained that because the taxpayer had "a duty to pay [the] tax" from the date the return was due to be filed until the date of the assessment, the government "possess[ed] the right of use of the money owed" during that period. *Id.* at 565-566. Under *Manning*, the government has a property interest in uncollected taxes that are legally due, and a scheme to deprive the government of such taxes therefore satisfies *McNally*'s money or property requirement.

2. The Inapplicability Of The Wire Fraud Statute To State Issued Licenses Does Not Assist Petitioners

In support of their argument that schemes to deprive a government of tax revenue do not satisfy the money or property requirement, petitioners mistakenly rely on this Court's decision in *Cleveland*. In that case, the Court held that a State of Louisiana video poker license was not government property within the meaning of the mail fraud statute. The Court reasoned that the government's interest in the license was regulatory and that regulatory interests do not satisfy the wire fraud statute's money or property requirement. 531 U.S. at 20-24. Petitioners contend that, because the government also has a regulatory interest in imposing taxes, a government's interest in tax revenue does not satisfy the money or property requirement. Pet. Br. 41-44.

The indictment in this case, however, did not charge that petitioners schemed to defraud a foreign government of its regulatory interest in imposing taxes. Rather, the indictment charged that petitioners

schemed to deprive Canada and Ontario of money due under their tax laws. Pet. App. 58a. The jury instructions similarly asked the jury to decide whether petitioners had devised "a plan *to deprive another of money* by trick, deceit, deception or swindle." J.A. 86 (emphasis added). Nothing in *Cleveland* suggests that such a scheme fails to satisfy the money or property requirement. To the contrary, the Court in *Cleveland* emphasized that "[t]ellingly, as to the character of Louisiana's stake in its video poker licenses, the Government nowhere alleges that Cleveland defrauded the State of any money to which the State was entitled by law. Indeed, there is no dispute that TSG paid the State of Louisiana its proper share of revenue, which totaled more than $1.2 million, between 1993 and 1995." 531 U.S. at 22. As that passage indicates, a scheme to defraud a government of tax revenue satisfies the wire fraud statute's money or property requirement because it involves defrauding the government of "money to which the [government] was entitled by law." *Ibid.*

Cleveland states that the object of the fraud must be property "in the victim's hands," and not merely property in the defendant's hands. 531 U.S. at 26. In light of the common law understanding of fraud, this Court's decision in *Manning*, and the passage in *Cleveland* cited above, that formulation necessarily encompasses schemes to deprive a government of money that is legally due under its tax laws. "[T]axes owed to the government—even if not yet collected—are property in the hands of the government." *Fountain*, 357 F.3d at 257.

Petitioners assert (Pet. Br. 38-40), that the analysis in *Cleveland* would mandate, in order to determine whether an indictment charging a scheme to defraud a foreign government of tax revenue satisfies the money

or property requirement, "a highly intrusive endeavor requiring a detailed inquiry into complex substantive and procedural issues under foreign tax systems." In a reprise of their revenue-rule arguments, petitioners suggest that such an inquiry would require the courts to make determinations that "necessarily affect[] the foreign relations of the United States." *Id.* at 40. That contention is unfounded. To determine whether an indictment alleges an offense, a court need only determine whether the foreign government has required the payment of taxes and whether the defendant schemed to fraudulently deprive the foreign government of those taxes. In making that inquiry, it is not necessary to decide whether or when a foreign tax claim is transferrable, whether the government has a regulatory as well as a monetary interest in its tax laws, or whether the foreign tax is consistent with United States public policy. *Id.* at 38-40. As long as foreign law requires the payment of taxes and the defendant has schemed to deprive the foreign government of that tax revenue, *McNally*'s money or property requirement is satisfied. The analysis is particularly straightforward in a scheme like petitioners' where, unlike the scheme in *Cleveland*, the whole point of the enterprise is to deprive the foreign government of taxes due.

3. The Revenue Rule Does Not Defeat A Showing By The United States That A Foreign Nation Has A Money Or Property Interest In Taxes Due

Petitioners argue that depriving a foreign government of tax revenue cannot be common law fraud because the revenue rule prevents a foreign government from asserting a common law fraud claim to recover lost tax revenue. Pet. Br. 33-34; see *id.* at 29. That argument reflects a misunderstanding of the re-

venue rule. When a court invokes the revenue rule to bar a suit that seeks to collect tax revenue under a common law fraud theory, it is not for failure to allege the elements of common law fraud. Instead, the suit is dismissed because the revenue rule requires a foreign government to resort to its own courts, rather than ours, to enforce its common law fraud claim. See *Dicey & Morris* 89 (expressing the revenue rule as a rule of jurisdiction). Because the wire fraud statute requires the government to show that there was a scheme to defraud and not that the victim of the fraud could recover on a fraud claim in our courts, the revenue rule has no bearing on the government's ability to prove the elements of a wire fraud violation.[9]

[9] Petitioners argue that the government failed to prove the "materiality" and the "money or property" elements of the offense. Pet. Br. 34-35, 41. Those fact-bound contentions are not within the question presented. In any event, the government introduced evidence that Canada and Ontario impose taxes on the importation and sale of liquor, and that petitioners sought to deprive Canada and Ontario of that tax revenue through a scheme that involved concealment of the liquor in the trunks of cars, failure to answer truthfully when Canadian officials asked what goods were being brought into the country, and failure to present vehicles for inspection when directed to do so. Pet. App. 3a-4a, 18a. That evidence was more than sufficient to prove both elements.

F. Neither The Smuggling Statute Nor The United States-Canada Revised Protocol Bars A Wire Fraud Prosecution Of A Scheme To Defraud A Foreign Government Of Tax Revenue

1. The Smuggling Statute Does Not Limit The Scope Of The Wire Fraud Statute

Petitioners err in contending (Pet. Br. 21-22) that the existence of the smuggling statute, 18 U.S.C. 546, precludes a wire fraud prosecution charging a scheme to defraud a foreign government of tax revenue. The smuggling statute prohibits any person owning a United States vessel from allowing the vessel to be used for smuggling goods into another country in violation of the laws of that country, provided that the other country has a reciprocal prohibition. 18 U.S.C. 546. The wire fraud statute, however, does not require a reciprocal prohibition as an element of the offense, and nothing in the terms of the smuggling statute purports to introduce that element into the subsequently enacted wire fraud statute.

Indeed, while some conduct can be covered by both statutes, the smuggling statute and the wire fraud statute involve distinct offenses with different elements. To prove a violation of the smuggling statute, it is not necessary to prove that the smuggling has been executed through interstate wires, or that there has been a scheme to deprive the foreign government of money or property. On the other hand, to prove a violation of the wire fraud statute, it is not necessary to prove that a vessel has been used for the purpose of smuggling goods into another country or that the country that is the object of the fraud has a reciprocal statute.

Petitioners argue that because the smuggling offense is more specific than the wire fraud offense with respect to the conduct of smuggling, only the smuggling statute may be applied. Pet. Br. 45- 46. But where conduct violates two criminal statutes, the decision about which charge to bring "generally rests entirely in [the prosecutor's] discretion." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 364 (1978). That principle applies regardless of whether one of the statutes is more specific with respect to the conduct at issue.

For example, in *Edwards* v. *United States*, 312 U.S. 473, 484 (1941), the Court held that the government could prosecute a scheme to engage in securities fraud through the mail under the mail fraud statute, even though the same conduct was covered by the more specific securities fraud statute. The Court explained that "[t]he two can exist and be useful, side by side." *Ibid.*

The courts of appeals have also repeatedly held that the government is entitled to prosecute conduct under the mail fraud statute even though that conduct is covered by a more specific statute and the more specific statute, like the smuggling statute, carries less severe penalties. See, *e.g.*, *United States* v. *Oldfield*, 859 F.2d 392, 397-399 (6th Cir. 1988) (permissible for government to charge mail fraud rather than odometer tampering); *Dale*, 991 F.2d at 849 (permissible for government to charge mail fraud rather than tax fraud); *Melvin*, 544 F.2d at 773 (permissible to charge mail fraud rather than violation of Jenkins Act); *United States* v. *Brien*, 617 F.2d 299, 310 (1st Cir.) (permissible to charge mail fraud rather than violation of Commodities Futures Trading Act), cert. denied, 446 U.S. 919 (1980). As those cases demonstrate, more specific statutes do not control or limit the government's authority to proceed

under the mail and wire fraud statutes provided the terms of the mail and wire fraud statutes have been violated. That principle is controlling here.[10]

2. The United States-Canada Treaty Does Not Limit The Scope Of The Wire Fraud Statute

Prosecution of a scheme to defraud a foreign government of tax revenue also does not conflict with the United States-Canada Revised Protocol. See A Revised Protocol Amending the 1980 Tax Convention With Canada, Mar. 17, 1995, U.S.-Canada, art. 15, S. Treaty Doc. No. 104-4 (1995). The Revised Protocol provides for mutual assistance in collecting tax revenue with respect to "all categories of taxes" (*id.* at 16 (adding Art. XXVI A, para. 9)), and has three provisions that petitioners rely on here. First, it authorizes tax collection assistance only for a revenue claim that has been "finally determined." *Id.* at 14 (adding Art. XXVI A, para. 2). Second, it bars assistance for the collection of any revenue claim arising during the time a person was a citizen of the government from whom assistance is requested. *Id.* at 8 (adding Art. XXVI, para. 8). Finally, it requires Canada and the United States to provide "comparable levels of assistance." *Id.* at 16 (adding Art. XXVI A, para. 11).

Petitioners contend that those limitations counsel against interpreting the wire fraud statute to permit

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[10] The United States Attorney's Manual advises prosecutors not to prosecute schemes to defraud the United States of tax revenue under the mail and wire fraud statutes absent exceptional circumstances. U.S. Attorney's Manual § 6-4.210 (2004). That reflects a judgment about the appropriate exercise of prosecutorial discretion. It does not reflect a judgment that the mail and wire statutes do not apply to such conduct. See 18 Tax Div. Dir. No. 99, at 2-3 (Mar. 30, 1993).

prosecution in this case because petitioners are citizens of the United States and Canada has not finally determined the taxes due. If such a prosecution were permitted, petitioners argue, it would give Canada greater assistance in collecting tax revenue than that extended by the Protocol. Pet. Br. 49. The flaw in petitioners' argument is that the present prosecution is not designed to serve as a means for Canada to collect taxes on its own behalf. Rather, the prosecution seeks to prevent criminals based in the United States from using this country as a means of victimizing foreign governments. The prosecution itself does not affect the extent to which petitioners owe taxes to the Canadian government. The domestic criminal prosecution in this case is therefore authorized by the provisions of the wire fraud statute, and nothing in the Revised Protocol detracts from that conclusion.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

PAUL D. CLEMENT
Acting Solicitor General

CHRISTOPHER A. WRAY
Assistant Attorney General

MICHAEL R. DREEBEN
Deputy Solicitor General

IRVING L. GORNSTEIN
Assistant to the Solicitor General

KIRBY A. HELLER
Attorney

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(9)

No. 03-725

IN THE

Supreme Court of the United States

DAVID B. PASQUANTINO, CARL J. PASQUANTINO & ARTHUR HILTS,

Petitioners,

v.

UNITED STATES OF AMERICA,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

REPLY BRIEF FOR THE PETITIONERS

BRUCE R. BRYAN
333 East Onondaga Street
Syracuse, New York 13202
(315) 476-1800

Counsel for Petitioner Carl J. Pasquantino

JENSEN E. BARBER
JENSEN E. BARBER & ASSOCS.
400 – 7th Street, N.W.
Washington, DC 20004
(202) 737-8511

Counsel for Petitioner David B. Pasquantino

LAURA W. BRILL*
CHRISTOPHER NEWMAN
KATHERINE KRAUS
IRELL & MANELLA, LLP
1800 Avenue of the Stars
Los Angeles, California 90067
(310) 277-1010

Counsel for Petitioner Arthur Hilts

* *Counsel of Record*

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ARGUMENT

The government asks this Court to read the wire fraud statute as both authorizing criminal prosecutions of U.S. citizens for failure to pay foreign taxes and granting to the Executive the sole and unreviewable discretion as to whether such laws violate this country's public policies. The government thus asserts that by a statute enacted in 1952—when the nation's primary foreign policy concern was not international terrorism, but the spread of Communism—Congress incorporated wholesale into the criminal law of the United States the regulatory and redistributive tax polices of every foreign nation on Earth. Moreover, Congress saw fit to enact this radical departure from western legal tradition *sub silentio*, leaving courts to infer it from the general language of a fraud statute. This reading of the statute defies this Court's precedents, the common law background, the basic principles of statutory interpretation, and common sense.

A. The Government Misconstrues The Scope Of The Revenue Rule.

The government does not dispute that the revenue rule is an established part of the common law against which the wire fraud statute must be interpreted. Instead it presents a narrow construction of the rule rendering it inapplicable in principle to any domestic criminal prosecution, regardless of how pervasively that prosecution depends upon and implements foreign revenue laws. The government presents the revenue rule as consisting of a "core principle" that "prevents a foreign sovereign from filing suit in this country to recover money due under its tax laws." Opp. 12. It then goes on to depict this "core principle" as having birthed two "ancillary principles," which bar certain other suits if they meet two technical criteria: (1) they are brought by a foreign sovereign or someone acting "on its behalf," and (2) their "object" is to vindicate a foreign sovereign's interest in collecting tax revenue. Opp. 15. Based on its construction of the revenue rule, the government asserts that a domestic criminal prosecution involves

neither the "core" nor the "ancillary" principles, and is therefore outside the rule's scope altogether.

The government's construction of the revenue rule is backward, taking the facts of selected cases to define the boundaries of the doctrine, while ignoring the history and the stated principles behind those cases—indeed, labeling any attempt to apply those principles to new facts as an illegitimate attempt at "expansion based on policy considerations." Opp. 27. Contrary to the government's depiction, the revenue rule is not a narrowly technical rule aimed only at preventing a particular means of tax collection.[1] It deals with one of the most basic jurisprudential issues arising from the existence of competing sovereigns within the rule of law: the extent to which the courts of one sovereign will recognize and implement the public policies of another.

Contrary to the government's ahistorical view, the "core" of the revenue rule was never "prevent[ing] a foreign sovereign from filing suit in this country to recover money due under its tax laws." Opp. 12.[2] *Boucher v. Lawson*, 95 Eng. Rep. 53 (K.B. 1734), which is generally regarded as the earliest application of the "revenue rule," involved neither a suit on behalf of a foreign sovereign, nor any attempt to collect tax revenue at all.[3] In fact, the reasoning of the opinion itself did not even single out revenue laws for special treatment. Instead, Lord Hardwicke invoked a broader principle: that "the

[1] Indeed, the government's construction renders the point of the rule unintelligible. If uncollected tax revenues are, as the government argues, merely a form of property like any other, why would the courts of one sovereign begrudge another the right to recover such property?

[2] Such cases actually did not arise until relatively late in the revenue rule's history, when they were recognized as clear—though unprecedented—violations of the rule. *See* Pet. Br. 24 n. 26.

[3] The issue in *Boucher* was whether a shipowner could refuse to deliver up a shipment of gold entrusted to him by plaintiff on the ground that the gold's exportation from Portugal violated that country's laws. *See* 95 Eng. Rep. at 53.

right of an English subject cannot be altered by the general law of any other country, unless there has been a particular determination in his case."[4] In the absence of any such determination by the foreign sovereign, Lord Hardwicke declined to apply the foreign law in the first instance himself. *Id.* at 55-56.

The basic principle behind the revenue rule is thus neither thwarting tax collection nor promoting commerce, but cabining the extraterritorial effect of the public policy choices made by foreign sovereigns. Like the rule against enforcement of foreign penal laws (hereinafter, "the penal rule"), the revenue rule saves domestic courts from the dilemma of either serving as passive vehicles for another sovereign's policies, or being forced to pass judgment on those policies. Restatement (Third) of Foreign Relations Law of the United States ("Restatement"), § 443, Reporters' Note 10 (1986).

In order to buttress its contention that only suits brought by foreign governments or "on their behalf" implicate the rule, the government attempts to dismiss as irrelevant *Boucher*, *Holman v. Johnson*, 98 Eng. Rep. 1120 (K.B. 1775), and other cases involving enforcement of private contracts either requiring or assuming a violation of foreign revenue law. Opp. 16-17 n.5. Contrary to the government's suggestion, these cases were not repudiated. The court in *Foster v. Driscoll*, [1929] 1 K.B. 470, 518-19 (Eng. C.A.), regarded *Holman* as binding and did not apply it in that case because U.S. prohibition laws were not, properly speaking, revenue laws.[5] The various Lords who had the last word in *Regazzoni v. K.C. Sethia (1944) Ltd.*, [1958] A.C. 301 (Eng. H.L.), followed suit, distinguishing *Holman* rather than accepting the

[4] 95 Eng. Rep. at 55 (Lee, J.). This was Justice Lee's restatement of the principle discussed at greater length by Lord Hardwicke.

[5] *See* [1929] 1 K.B at 518-19 (law in question "was no mere revenue law; it was intended to prevent a malum in se rather than a malum prohibitum").

lower court's invitation to do away with it.[6] Thus the government's statement that "there is no firmly established common law rule governing such cases," Opp. 17 n.5, is inaccurate.[7] Certainly, at the time the wire fraud statute was enacted, it remained "firmly established" that evasion of foreign revenue obligations would not invalidate a contract, regardless of whether a foreign state was party to the suit or stood to gain tax revenue from its outcome.[8]

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[6] *See* [1958] A.C. at 322-23 (Viscount Simonds) (cases relating to breach of revenue law "not germane" to this case); *id.* at 324 (Lord Reid) (stating that law at issue was not a revenue law, and expressly leaving any reexamination of the revenue rule cases for some future date); *id.* at 328 (Lord Keith) (stating that revenue rule could not "be invoked in the circumstances of this case"); *id.* at 329 (Lord Somervell) (distinguishing *Holman*, which left open the possibility that "the law of one country would take notice of illegalities arising under the laws of another country other than revenue laws").

[7] Even if one looks beyond the enactment of the wire fraud statute in 1952, the government has cited only one case—decided in Singapore in 1994—that expressly takes the step of invalidating a contract based on violation of something the court recognizes as a revenue law. *See Bhagwandas v. Brooks Exim Pte Ltd.*, [1994] 2 Sing. L. Rep. 431, 438 (Sing. H.Ct.) (disagreeing with a case from 1980 that depicted *Foster* as having taken this step) ("With the utmost respect, *Foster* was not a case involving foreign revenue law."). As for *Ralston Purina Co. v. McKendrick*, 850 S.W.2d 629 (Tex. App. 1993), the violation there was shipping feed into Mexico without a permit, not evasion of revenue law. *See id.* at 639.

[8] Nor at that time had any court even voiced doubt that the rule would apply to an action that required a domestic court to calculate a foreign tax in the first instance or that inflicted punishment based on the failure to pay such a tax. Indeed, the government has identified no case prior to *United States v. Boots*, 80 F.3d 580 (1st Cir. 1996), in which an Executive criminally prosecuted its own citizens for evasion of another country's revenue laws. Significantly, cases dealing with contracts made in violation of foreign law raise unique difficulties not at issue in this case, as enforcement of a promise to violate a foreign sovereign's law can be seen as rendering the court an active participant in the violation.

The government treats *Peter Buchanan Ltd. v. McVey*[9] as standing for the proposition that a lawsuit is barred by the revenue rule if—and only if—"the entire object of the suit is to recover taxes for the foreign government." Opp. 14. In so doing, the government confuses the facts of this case with the principle animating it. The court in *Peter Buchanan* refused to enforce the claim before it, not because the particular *remedy* requested would result in the recovery of tax monies, but because the *right* being asserted amounted to a foreign government's right to have its revenue laws executed. [1995] A.C. at 527. Execution of another sovereign's revenue laws—whether directly or indirectly, through recovery of taxes or punishment of those who fail to pay them—involves a court in the furtherance of essentially arbitrary policies that "are the offspring of political considerations and political necessity." *Id.* at 529. Such laws may pursue "social policies and ideals dangerous to the security of adjacent countries," and rather than attempt to make distinctions between the policies of various states, the court regarded "universal rejection" as the only safe course. *Id.* The principles behind the revenue rule are the same regardless of the form that enforcement of a foreign revenue law takes. The government cannot rely on the unprecedented nature of its actions to argue that they are outside the scope of the rule.[10]

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[9] [1995] A.C. 516 (Ir. H. Ct. 1950), *aff'd*, [1995] A.C. 530 (Ir. Sup. Ct. 1951).

[10] In a related context, this Court has stated that "a general constitutional rule already identified in the decisional law may apply with obvious clarity to the specific conduct in question, even though 'the very action in question has [not] previously been held unlawful.'" *United States v. Lanier*, 520 U.S. 259, 271 (1997) (citing *Anderson v. Creighton*, 483 U.S. 635, 640 (1987)). "The easiest cases don't even arise. There has never been . . . a section 1983 case accusing welfare officials of selling foster children into slavery; it does not follow that if such a case arose, the officials would be immune from damages [or criminal] liability." *Lanier*, 520 U.S. at 271 (citations and internal quotation marks omitted).

B. The Prosecution In This Case Manifestly Enforces Canadian Revenue Law.

There is no doubt that if a foreign nation or private party brought suit in this country attempting to enjoin or penalize someone based on violation of foreign tax laws, such suit would be barred by the revenue rule.[11] The government is therefore incorrect when it asserts that this prosecution "does not provide a foreign government with an indirect route to achieve indirectly what it is forbidden from achieving directly by the revenue rule." Opp. 16. Moreover, the government's position that its prosecution of Petitioners for wire fraud does not enforce Canadian revenue law defies common sense. If the government's reasoning were correct, it would follow that when a U.S. citizen refuses to pay U.S. income taxes, and is put in jail for his refusal, this does not, *even indirectly*, enforce U.S. revenue law.

The government asserts that this prosecution does not enforce Canadian law, because its "object" is only to enforce U.S. law. If this sort of subjective characterization of intent were dispositive, then there would be no basis for disallowing RICO suits brought by foreign sovereigns to recover tax revenue. Such sovereigns could also assert that their only "object" was to recover damages for violation of their rights pursuant to U.S. law.[12] In fact, the government has no interest

[11] *See* Pet. Br. 16-17 (discussing *Wisconsin v. Pelican Ins. Co.*, 127 U.S. 265 (1888)); Pet. Br. 25 n.28 (citing *Oklahoma ex. rel. West v. Gulf, Colorado & Santa Fe Ry. Co.*, 220 U.S. 290 (1911)).

[12] *See Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 131 & n.39 (2d Cir. 2001) (noting but rejecting Canada's arguments "that this is an action brought solely under United States law, and not a claim for Canadian taxes," and stating that "we do not understand how a formalistic distinction between an action based explicitly and entirely on Canadian law and one which, in effect, pleads violations of Canadian law through the medium of a United States statute, is a response to the concerns outlined above about, *inter alia*, judicial non-interference with international tax policy-making by the political branches."), *cert. denied*, 537 U.S. 1000 (2000).

in this case that is separable from its enforcement of Canadian revenue law. Its interest in "preventing our nation's interstate wire communication systems from being used in furtherance of criminal fraudulent enterprises," *id.*, is implicated here only if someone was in fact defrauded out of "money or property." *See* Pet. Br. 35-44; *infra* at 9-12. The purpose of the wire fraud statute is to prevent such frauds, not merely to protect the integrity of the U.S. wires. *See* Pet. Br. 30-31. Absent the district court's application in the first instance of Canadian revenue law, there would be no basis for finding the "property" interest alleged in this case to exist.[13] Nor is there any "object" of the government's action that does not "vindicate the foreign sovereign's interest in collecting tax revenue." Opp. 15. The primary objects of criminal punishment are "retribution [and] deterrence." *Kansas v. Hendricks*, 521 U.S. 346, 362 (1997). Here, the level of retribution was calibrated using Canadian tax law, and any deterrent effect is clearly focused on persons in this country who might be inclined to attempt evasion of Canadian taxes. If incarcerating one who thwarts your interests does not "vindicate" them, it is difficult to imagine what does.[14]

C. The Policies Underlying The Revenue Rule Still Hold Force Today.

The government acknowledges "separation-of-powers and judicial competence rationales for the revenue rule," but re-

[13] By contrast, the foreign tax obligations of which the court took notice in *Peter Buchanan* had been assessed and confirmed on appeal by a court of the country imposing them. [1955] A.C. at 519.

[14] Even if tax recovery *per se* were the ultimate concern, the Mandatory Victims Restitution Act, which the Executive Branch has nullified in this case, provides for full restitution and gives victims numerous rights, including the right to receive notice and an opportunity to be heard, 18 U.S.C. § 3664(d)(1) & (2), and the right to receive an abstract of judgment, which, following certain ministerial procedures, "shall be a lien on the property of the defendant. . . ." *Id.* at § 3664(m)(1)(B). Thus, in a wire fraud prosecution, tax recovery should properly be regarded as an "object" of the action.

gards them as insignificant. Opp. 22-27. Despite the government's expansive views of executive power, the Executive Branch does not have the power to make law or the power to say what the law is. Therefore, the exercise of prosecutorial discretion cannot eliminate the significant separation-of-powers issues in this case. Pet. Br. 45; *infra* at 15-20.

Nor is the government correct in minimizing the significant problems of institutional competence that its view of the law—in which U.S. courts do not merely enforce foreign tax judgments but apply foreign tax law in the first instance themselves—would create. Federal judges have neither the training nor the accountability to act as foreign tax assessors, and in the absence of clear direction from Congress have no office to engage in such a pursuit. As a federal procedural rule, the existence of Federal Rule of Criminal Procedure 26.1, which governs how foreign law is to be proved in U.S. courts, "shall not abridge, enlarge or modify any substantive right." 28 U.S.C. § 2072. This rule therefore cannot justify a more expansive view of the wire fraud statute or less robust view of the revenue rule. In any event, the fact that this rule does not make U.S. institutions able to resolve foreign tax questions fairly or correctly is well illustrated in this very case where the government failed to give notice that it intended to prove foreign law, as required by the rule, but obtained a conviction anyway, and where the government itself, despite its vast resources and expertise, has demonstrated just how difficult it is to know what foreign law is. *Compare* Opp. 17-18 (discussing *Regazzoni v. K.C. Sethia*, [1956] 2 Q.B. 490), *with supra* at 3-4 (discussing *Regazzoni v. K.C. Sethia (1944)* Ltd., [1958] A.C. 301 (Eng. H.L.)).

D. The Government Misconstrues The Scope Of The Wire Fraud Statute.

The government argues that the wire fraud statute applies to schemes relating to foreign taxes because (1) tax schemes are within the scope of the wire fraud statute, and (2) foreign

entities may be victims of frauds punishable under that statute. Opp. 10-11. Because the revenue rule is a background rule relating specifically to foreign tax laws, even if the government were correct about these points, it would not follow that foreign tax offenses fall within the scope of the wire fraud statute. In any event, the government's arguments regarding the reach of the wire fraud statute into both tax offenses and foreign conduct are mistaken.

1. Tax Schemes Generally Fall Outside The Scope Of The Wire Fraud Statute.

Interests that a governmental entity may have in its revenue collection role do not fit within the meaning of the term "money or property" as that term has been interpreted in the context of the mail and wire fraud statutes.[15] As Judge Weinfeld observed thirty years ago, use of these provisions has generally been confined to "schemes of a type designed to defraud members of the community at large, in the sale of commodities and services, rather than schemes to defraud the government." *United States v. Henderson*, 386 F. Supp. 1048, 1053 (S.D.N.Y. 1974) (mail fraud statute did not reach a scheme to defraud the Internal Revenue Service in the collection of income taxes).[16]

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[15] Although the government recognizes this Court's rulings regarding the "money or property" element of wire fraud, Opp. 28, it appears to argue that those holdings should be disregarded. Opp. 9, 10, 12. This Court rejected an identical argument in *Cleveland v. United States*, 531 U.S. 12, 25-26 (2000); *see also McNally v. United States*, 483 U.S. 350, 359-60 (1987); *Carpenter v. United States*, 484 U.S. 19, 25 (1987). The government provides no reason why principles of *stare decisis* should be abandoned.

[16] *See also Henderson*, 386 F. Supp. at 1035 n.18 ("The few cases in which schemes to defraud governmental units have been held to constitute schemes to defraud within the meaning of the mail fraud provision have involved the purchase or sale by the government of commodities or services."); *United States v. Griffin*, 324 F.3d 330, 353-55 (5th Cir. 2003) (tax credits not "property" under wire fraud statute); *United States v. Por-*

Despite the government's protestation to the contrary, Opp. 37 n.10, the Executive Branch itself has expressed the view that such prosecutions go beyond the proper scope of the mail and wire fraud statutes. *See* U.S. Attorney's Manual § 6-4.210 (2004) (stating "the position of the Tax Division" that "*Congress intended* that tax crimes be charged as tax crimes" and that charging a tax offense as a mail fraud violation "could be viewed as *circumventing Congressional intent* unless unique circumstances are present justifying the use of a mail fraud charge.") (emphasis added) (citing *Henderson*, 386 F. Supp. at 1052-53).

The government points to a handful of cases decided prior to this Court's decision in *Cleveland* in which courts have allowed mail or wire fraud prosecutions based on non-payment of state or federal taxes. Opp. 10-11, 30. These cases are not useful for determining whether a government's interest in uncollected taxes qualifies as "money or property" as that term is now understood. Indeed, many of these cases predate *McNally* and incorrectly held that frauds made punishable by these provisions need not involve "money or property."[17]

Porcelli, 865 F.2d 1352, 1367-70 (2d Cir. 1989) (Newman, J., dissenting) (disapproving prosecution involving unpaid state sales tax because state suffered no deprivation of property).

[17] *See United States v. Melvin*, 544 F.2d 767, 773 (5th Cir. 1977); *United States v. Mirabile*, 503 F.2d 1065, 1066 (8th Cir. 1974); and *United States v. Brewer*, 528 F.2d 492, 494-95 (4th Cir. 1975). The later case, *United States v. Goulding*, 26 F.3d 656, 658-60 (7th Cir. 1994), involved a prosecution against attorneys in connection with a fraudulent tax shelter scheme, which was aimed at obtaining money or property from clients. *United States v. Helmsley*, 941 F.2d 71 (2d Cir. 1991), is a pre-*Cleveland* decision, which is inconsistent with the government's position in this case in that Mrs. Helmsley was convicted of mail fraud even though the government failed to prove that any taxes were due to the state of New York. *Id.* at 93-94. *United States v. Herron*, 825 F.2d 50 (5th Cir. 1987), supports Petitioners because in that case, a wire fraud conviction was *reversed* on grounds that the government held no "property" interest

The government's only post-*Cleveland* case is *Fountain v. United States*, 357 F.3d 250 (2d Cir. 2004), *cert. pending*, No. 04-294, which adopted the same flawed reasoning that the government proposes in this case, disregarding factors relating to the "property" determination that *Cleveland* had identified as significant, including whether the government's interest is transferable and whether the interest at issue is regulatory or proprietary.

Cleveland nowhere stated that in prosecutions based on tax offenses the prosecution did not have to establish the existence of a traditional property interest in the hands of the government. Rather, *Cleveland* made clear that even if a state has a "substantial economic" interest in collecting "tolls" relating to regulated activity, the issue is whether the government acts in a regulatory or proprietary manner. *Cleveland*, 531 U.S. at 21-22. Stating a principle that is as applicable to border crossings as to patent rights, the Court specifically stated that "[a] right to exclude in [a regulatory] capacity is not one appropriately labeled 'property.'" *Id.* at 24. The Court also included the power to "tax" in identifying typically regulatory functions, along with the power to "permit [and] regulate." *Id.*

The government also cites *Manning v. Seeley Tube & Box Co.*, 338 U.S. 561 (1950), which relates to the accrual of interest under the Internal Revenue Code, as support for the proposition that foreign sovereigns necessarily possess the bundle of rights that we regard as "property" beginning the moment a tax is due under their laws. Opp. 31. The govern-

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in disclosures regarding currency transactions. *Id.* at 53-57. The government submitted no proof in this case regarding what, if any, disclosure requirements Canada imposes, much less that any such requirements would create a property interest. Nor did the government prosecute Petitioners for seeking to obtain from Canada any chose in action. Had Petitioners' alleged scheme been completed, it would not have resulted in Petitioners obtaining a cause of action that formerly belonged to Canada. To the contrary, Canada would have retained a claim against them.

ment, however, provides no basis for this spectacular and myopic leap of faith that homogenizes all the world's tax laws into one,[18] demonstrating just how ill equipped the institutions of this country are to resolve issues of foreign tax law.

2. A Government Does Not Necessarily Have A Property Interest In Taxes That Are Legally Due.

The government argues that "money that is legally due" under a foreign sovereign's tax laws is necessarily "money or property" for purposes of the wire fraud statute. This is incorrect. Whether and at what point an uncollected tax becomes "property" under the wire fraud statute, while ultimately a question of federal law, cannot be determined without a close analysis of the law of the jurisdiction that creates the right or interest in the first place, *see, e.g.*, *Cleveland*, 531 U.S. at 21-24. Depending on the laws of the jurisdiction, it is entirely possible for taxes to be due without constituting government property.

For example, in *United States v. Johnston*, 268 U.S. 220 (1925), a boxing promoter failed to pay taxes due on admission fees and was convicted of embezzlement. This Court reversed the embezzlement conviction, noting that "[t]he money paid for the tax is not identified at the outset but is paid with the price of the ticket that belongs to the owner of the show." *Id.* at 227. The Court viewed the defendant as a "debtor and not a bailee," indicating that the money he held was not government property, even though taxes were due. *Id.* Earlier, in 1910, this Court held that a district court clerk could not be convicted of embezzlement or fraudulent conversion for failing to pay to the government fees collected by

[18] Reliance on *Manning* is also incorrect because the timing of interest payments is a matter of policy, based on administrative criteria and substantive objectives. It no more defines when a property interest exists in an uncollected tax than does a negotiated interest provision in a contract for the purchase of goods or services.

the court, where the statutes relating to fee collection and clerk compensation did not support a finding that the government had a property interest in the fees. *United States v. Mason*, 218 U.S. 517, 519-31 (1910).

No rule exists today that taxes become state property at the moment they are "due." *People v. Nappo*, 94 N.Y.2d 564 (2000), for example, involved larceny charges for failure to pay state taxes on the importation and distribution of motor fuel. The court held that the defendants could not be so charged because "[t]he taxes due were not the property of the State *prior to their remittance*." *Id.* at 566 (emphasis added); *see also State v. Marcotte*, 418 A.2d 1118, 1121-22 (Me. 1980) (defendant could not be charged with theft by misapplication of property for failing to pay state sales tax, when relevant taxing law included no obligation to reserve funds for payment to state); *cf. United States v. Gwin*, 839 F.2d 427, 429-30 (8th Cir. 1988) (reversing conviction under 18 U.S.C. § 641 due to lack of governmental property interest). Foreign tax law is at least as complex and nuanced as our own.

By proposing a single test for determining when a foreign nation acquires a property interest in its taxes, the government creates potential for interference in that nation's affairs. First, as in the above cases, foreign tax law may not create a governmental interest that qualifies as property at the moment the tax comes due. Second, the courts of this country, called upon to interpret another country's tax procedures, could reach rulings inconsistent with those of the foreign country regarding when payment comes due.[19]

[19] These issues of interference cannot be resolved by saying that whether taxes are due can be determined based on whether the foreign government "has required the payment of taxes" and whether "the defendant schemed to fraudulently deprive the foreign government of those taxes." Opp. 33. Merely proving that a tax exists—assuming that is what the government means by the vague term "has required the payment of a tax,"—does not demonstrate that it is due. Moreover, the nature of a defendant's scheme cannot prove the legal issue of when a tax is due. If it

Even if the government's "taxes due" test were correct, which it is not, Petitioners' convictions would require reversal because neither the indictment nor the jury instruction made any reference to whether the tax money at issue was "due," and there was no evidence on this issue at trial.[20]

3. The Alleged Fraud At Issue Here Is Not Punishable By The Wire Fraud Statute.

The government agrees that Canada could not bring a civil fraud claim in this country relating to a tax fraud committed against it. Opp. 12-16. The government nonetheless argues that a criminal wire fraud prosecution is permissible here on such facts because the revenue rule is jurisdictional. Opp. 33-34. This argument is mistaken. *See Milwaukee County v. M.E. White Co.*, 296 U.S. 268, 272 (1935) (describing revenue rule decision as on "the merits"). Moreover, it turns the traditional distinction between criminal and civil law on its head, allowing criminal punishment where a more modest sanction would be unallowable.

The government refers to early statutes that punished frauds on the "revenue." Opp. 30. These authorities support Petitioners. Whereas the mail fraud statute applies to frauds relating to "money or property," the statutes to which the government points address conduct designed to "defraud *the revenue*" or to deprive the United States of "lawful duties." *Id.* (citing statutes). Had Congress intended to include tax fraud within the scope of the wire fraud statute, it would have used these terms. Congress did not do so.

Finally, the government argues that the evidence established the element of materiality for fraud. The government, however, fails to point to any affirmative misstatement or any showing that Canadian law requires disclosure.[21]

4. The Wire Fraud Statute's Use In Cases Involving Foreign Sovereigns Is Limited.

Even if the "money or property" and "fraud" elements of the wire fraud statute could be technically satisfied in a prosecution of this kind, there would still remain a question whether the foreign government's interests would be entitled to recognition in courts of this country. The revenue rule is an exception to the general principles of comity regarding recognition of foreign judgments. Those principles include making a judicial determination of whether the foreign government's law is contrary to the public policy of this country. *See Hilton v. Guyot*, 159 U.S. 113, 202-03 (1895). "The reluctance of courts to recognize . . . [foreign penal and revenue] judgments lies principally in unwillingness to accept such judgments without full scrutiny, and at the same time unwillingness to subject such actions of foreign states to scrutiny."

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could, a defendant could be convicted based on a mistaken belief that a tax was due, when his or her conduct was actually lawful. For example, in the case of a tax on foreign liquor, the prosecution might submit evidence that foreign liquor is taxed and that a defendant planned to enter a country without paying taxes. If, however, the tax is due only after a sale of the liquor within the country, then under the doctrine of legal impossibility, there should be no violation. *See, e.g., In re Sealed Case*, 223 F.3d 775, 779 (D.C. Cir. 2000) ("a hunter cannot be convicted of attempting to shoot a deer if the law does not prohibit shooting deer in the first place"); *United States v. McInnis*, 601 F.2d 1319, 1323-24 (5th Cir. 1979) ("it is not an offense to conspire to do an act that, if completed, would not be a crime").

[20] *See* Pet. App. 58a (indicting Petitioners for scheme to defraud Canada "of excise duties and tax revenues *relating to* the importation and sale of liquor"); J.A. 85-91 (instructing jury that guilt required finding that the scheme involved, alternately, "money," "some loss,"and "some financial loss"). This issue is "fairly included" in the question presented, Sup. Ct. R. 14.1(a), which refers to taxes "potentially owed to a foreign sovereign," not taxes that are due. *See also* Pet. 3 (pointing to lack of proof on point).

[21] The government's failure to prove a materially misleading statement is "fairly included" in the question presented, Sup. Ct. R. 14.1(a), which references an "*alleged* fraudulent scheme," indicating that Petitioners would contest the adequacy of proof, including on this element.

Restatement § 443, Reporters' Note 10. Were we to incorporate the norms of foreign tax law into U.S. criminal law through the wire fraud statute, traditional principles of comity, developed in connection with the recognition of other foreign laws and judgments, would necessarily come into play.

The government would incorporate foreign tax norms into U.S. criminal law, but at the same time eliminate this Court's authority to review the foreign law to ensure that it does not violate public policy, except in cases where the prosecution violates the U.S. Constitution. Opp. 23-25, 33. Thus, under the government's view, even though poll taxes are clearly contrary to U.S. public policy, as demonstrated by the Voting Rights Act, 42 U.S.C. § 1973h, numerous state law provisions, and the Twenty-Fourth Amendment to the U.S. Constitution, which forbids the collection of poll taxes in connection with federal elections, U.S. courts would be required to adjudicate wire fraud prosecutions based on evasion of a foreign poll tax because the U.S. Constitution does not prohibit a foreign government from charging a poll tax in its own elections.

This dwarfed judicial role is contrary to historical precedent. International comity is part of the law of the United States, and, at least in the absence of contrary direction from Congress, this Court has constitutional authority to resolve questions relating to such issues. *Hilton*, 159 U.S. at 162; U.S. Const. Art. III; *cf. Johnson v. Browne*, 205 U.S. 309 (1907) (enforcing Canada's treaty interpretation over U.S. objection).[22]

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[22] By way of comparison, in the context of the judicially created act of state doctrine, which, like the revenue rule is also based on principles of comity, Congress has, in narrow circumstances, dictated that a presidential determination regarding application of the act of state doctrine shall be controlling. *See* 22 U.S.C. § 2370(e)(2) ("Second Hickenlooper Amendment"). This Court has never resolved whether it is obliged to defer to a determination of the President under those narrow circumstances. This Court has consistently *rejected* the notion that U.S. courts are obliged to defer to the Executive's view on whether the act of state doctrine should apply in circumstances in which Congress has not expressly so directed. *See First National City Bank v. Banco Nacional de Cuba*, 406 U.S. 759, 772-73 (1972) (Douglas, J., concurring); *id.* at 773-76 (Powell, J., concurring); *id.* at 776-78 (Brennan, J., dissenting); *Alfred Dunhill of London, Inc. v. Cuba*, 425 U.S. 682, 715 (1976) (Powell, J., concurring); *id.* at 724-25 (Marshall, J., dissenting); *cf. id.* at 715 (Stephens, J., concurring).

Like the act of state doctrine, in the absence of a statute or treaty on point, the determination of whether comity requires the recognition of a foreign judgment or law is a judicial act, and the Executive does not in such cases have power to negate this judicial role. Thus, the government is wrong when it asserts that in a wire fraud prosecution based upon the failure to pay taxes to a foreign sovereign, separation-of-powers and institutional competence concerns are eliminated by the Executive's choice of when to prosecute. This is especially true when the Legislative Branch, in both the U.S. tax treaty with Canada and the statute that specifically governs the smuggling of goods into foreign countries, has manifested its intent that the courts of this country will *not* become involved in the enforcement of foreign revenue laws in the circumstances present here. *See* 18 U.S.C. § 546; A Revised Protocol Amending the 1980 Tax Convention with Canada, Mar. 17, 1995, U.S.-Canada, art. 15, S. Treaty Doc. No. 104-4 (1995). Executive action contrary to these provisions is void. *United States v. Guy W. Capps, Inc.*, 204 F.2d 655, 659-60 (4th Cir. 1953), *aff'd*, 348 U.S. 296 (1955); *see also Youngstown Sheet & Tube Co. v. Sawyer*, 343 U.S. 579 (1952).

"Congress legislates against the backdrop of the presumption against extraterritoriality." *See EEOC v. Arabian American Oil Co.*, 499 U.S. 244, 248 (1991).[23] This is especially true when criminal liability is at stake. "[L]egislative intent to subject conduct outside the state's territory to its criminal law should be found only on the basis of express statement or clear implication." Restatement § 403, Comment f. In addition, as a matter of statutory construction, courts presume that

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[23] *See also, McCulloch v. Sociedad Nacional de Marineros de Honduras*, 372 U.S. 10, 19-21 (1963); *Romero v. International Terminal Operating Co.*, 358 U.S. 354, 382-83 (1959); *Foley Brothers v. Filardo*, 336 U.S. 281, 286 (1949). This prosecution clearly gives the wire fraud statute extraterritorial effect in that "[t]he actions in [Canada] are . . . most naturally understood as the kernel of" Petitioners' alleged fraud. *Sosa v. Alvarez-Machain*, 124 S. Ct. 2739, 2748 (2004).

Congress seeks to follow customary international law by not enacting laws that could create unreasonable interference with the sovereign authority of other nations. *See, e.g., F. Hoffman-La Roche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359, 2366 (2004).[24]

Here, both principles are violated in that invoking the wire fraud statute based upon an alleged fraud directed at Canada and taking place in Canada gives that statute extraterritorial effect and interferes with Canada's own ability to regulate within its borders. No express statement by Congress authorizes this use of the statute.[25]

Wire fraud prosecutions of this type interfere with foreign sovereignty in several ways. In addition to the danger of misapplying foreign law, application of the wire fraud statute creates the potential for imposition of different remedies and punishments, which can create unreasonable interference. *Id.* at 2368. Canada may forgo criminal prosecution for violation of its customs laws under certain circumstances, such as if the violator provides restitution or provides cooperation to the government. A defendant may be unwilling to reach an

[24] Although the government points out that the statute uses the term, "any scheme," and argues that "any" is all-inclusive, Opp. 9-10 (citing *United States v. Gonzalez*, 520 U.S. 1, 5 (1997)), the government admits that the term "any" does not provide a clear statement abrogating the revenue rule. Opp. 19-21 (discussing restitution provision applicable to "any offense committed by fraud or deceit"). *Gonzalez* does not hold that the use of the term "any" gives a statute extraterritorial effect. *Id.* at 5. In contrast, this Court has held that the term "any criminal case" in the Self-Incrimination Clause does not include foreign criminal cases. *United States v. Balsys*, 524 U.S. 666, 672-74 (1998). The cases the government cites in which a wire fraud victim was a foreign public entity all involved the governments acting in a proprietary, not sovereign, capacity. Opp. 10.

[25] The statute's reference to wire transmissions in "foreign commerce" does not indicate a legislative intent to provide for the extraterritorial application of the statute. *See Arabian American Oil Co.*, 499 U.S. at 251; *McCulloch*, 372 U.S. at 15 n.3 and 19.

agreement with Canadian authorities knowing that the United States could prosecute for wire fraud.

Such interference is unreasonable under the analysis of *F. Hoffman-La Roche*, 124 S. Ct. at 2367, and Restatement § 403(2), which it cites. The regulation is inconsistent with traditions of the international system. Canada has a high interest in regulating, and there is a significant likelihood of conflict regarding interpretations of its tax laws and extent of punishment. Further, such prosecutions defy justified expectations in that U.S. citizens would not generally expect to be subject to U.S. criminal prosecution based on foreign revenue offenses. This is especially true here because the prosecution in this case is inconsistent with more specific authorities on point. *See supra* 17 n.22.[26] There has been and is no substantial, direct, or foreseeable harm to this country. Indeed, the alleged use of U.S. wires here is merely jurisdictional. Ample other enforcement means are available, including extradition and Canadian prosecution.

The parade of horribles the government hypothesizes has no factual connection whatsoever to this case. Opp. 23. The notion that the revenue rule will render the government unable to obtain convictions of persons involved in "international criminal organizations" that serve as a "training

[26] The government argues that it has discretion whether to prosecute under the wire fraud statute or the anti-smuggling statute, 18 U.S.C. § 546, and cites cases in which two or more statutes provide for punishment of the same conduct. Opp. 35-36. The relevance of Section 546, however, is not that it provides for a lesser punishment than wire fraud (although it does); rather, Section 546 is relevant because Petitioners' conduct is not covered by that more specific statute at all, because Congress intended to require reciprocation from the foreign country in order for smuggling into a foreign country to be criminal in this country in the first place. This is the clear statement of Congressional purpose *against prosecution* in these circumstances, and neither the wire fraud statute nor any other statute provides a comparably clear statement in favor of prosecution.

ground" for "operations that are later launched against domestic victims" is hyperbolic at best. The government did not begin prosecutions of this type until the 1990s, although the mail fraud statute had been in place for a century. The government retains an arsenal of weapons that it can employ against those who pose serious domestic threats. In the wake of September 11, Congress has hardly been shy about providing the Executive with additional authority to prosecute a broader array of financial crimes. But Congress has not expressed any intention—much less a clear intention—to allow prosecutions of the type at issue here. The government's request to have the shackles of the revenue rule removed from its wrists is best addressed to the body that enacted the wire fraud statue in the first place: Congress.[27]

CONCLUSION

The judgment of the court of appeals should be reversed and Petitioners' convictions and sentences vacated.

Respectfully submitted,

BRUCE R. BRYAN
333 East Onondaga Street
Syracuse, New York 13202
(315) 476-1800

Counsel for Petitioner
Carl J. Pasquantino

JENSEN E. BARBER
JENSEN E. BARBER & ASSOCS.
400 – 7th Street, N.W.
Washington, DC 20004
(202) 737-8511

Counsel for Petitioner
David B. Pasquantino

LAURA W. BRILL*
CHRISTOPHER NEWMAN
KATHERINE KRAUS
IRELL & MANELLA, LLP
1800 Avenue of the Stars
Los Angeles, California 90067
(310) 277-1010

Counsel for Petitioner
Arthur Hilts

October 7, 2004

* *Counsel of Record*

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[27] Petitioners argued below that the district court's amount of loss determination violated the Sixth Amendment. *See* J.A. 95, 98. Petitioners have consistently maintained that their sentences could not properly be based on a purported revenue loss to Canada, and the jury never determined what the relevant amount would be. If this Court were to find against Petitioners regarding the arguments raised above, the Court should still remand in light of *Blakely v. Washington*, 124 S. Ct. 2531 (2004).

(7)

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IN THE

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UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

BRENDAN DOWD
FRANK GOLDMAN
JEREMY MALTBY
MARK TEETER
JAMES WALDEN
O'MELVENY & MYERS, LLP
7 Times Square
New York, New York 10036
(212) 326-2000

JOSHUA L. DRATEL*
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
Co-Chair, Amicus Committee
1150 18th Street, NW
Suite 950
Washington, D.C. 20036
(212) 732-0707

QUENTIN RIEGEL
NAT'L ASS'N OF MANUFACTURERS
Vice President, Litigation & Deputy General Counsel
1331 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 637-3000

*Counsel of Record

Attorneys for Amici Curiae

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On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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BRIEF OF THE NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AND THE NATIONAL ASSOCIATION OF MANUFACTURERS AS AMICI CURIAE IN SUPPORT OF PETITIONERS

This brief is filed on behalf of the National Association of Criminal Defense Lawyers ("NACDL") and the National Association of Manufacturers ("NAM") as *amici curiae* in support of petitioners, with the written consent of the parties.[1]

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[1] As required by Rule 37.6 of this Court, *amici curiae* submit that no party or counsel for a party to this case authored this brief in whole or in part, and no person or entity other than *amici curiae*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

INTEREST OF AMICI CURIAE

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,000 attorneys, in addition to more than 28,000 affiliate members from every state. Founded in 1958, NACDL is the only professional bar association that represents public and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates.

NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice. In keeping with that stated mission, NACDL is dedicated to the preservation and improvement of our adversary system of justice. NACDL frequently files briefs before this Court in cases implicating its substantial interest in substantive criminal law and the ambit of the mail fraud statute and definition of "property" thereunder.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association. The NAM represents 14,000 members (including 10,000 small and mid-sized companies) and 350 member associations serving manufacturers and employees in every industrial sector and in all 50 states. Members of NAM are subject to increased use of criminal penalties in the regulatory state and to the uncertainty that attends the obligation to comply with laws and regulations of multiple (domestic and foreign) jurisdictions whose own construction of those laws is often ambiguous.

SUMMARY OF ARGUMENT

In the face of repeated efforts by prosecutors and lower courts to expand the reach of the federal mail and wire fraud statutes, 18 U.S.C. §§ 1341 & 1343, this Court has provided repeated and recent guidance that these statutes protect only well established property interests and that any ambiguities about their coverage "'should be resolved in favor of lenity.'" *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (quoting *Rewis v. United States*, 401 U.S. 808, 812 (1971)); *see also McNally v. United* States, 483 U.S. 350 (1987) (same). Despite these clear instructions about the proper methodology for interpreting the mail and wire fraud statutes, the government prosecuted petitioners and obtained their convictions on the theory that they had schemed to take "property" in the form of unassessed and uncollected taxes purportedly due to a foreign government, even though the prosecution conceded that the centuries-old revenue rule barred the ostensible victim of that fraud from recovering its "property" in U.S. courts. The government's position and the reasoning of the courts below stand in flat contradiction to this Court's recent teachings, violate the principle of lenity in construing criminal statutes, and threaten a wholesale expansion of the mail and wire fraud statutes that would lead to unpredictable, unwieldy, and unfair prosecutions. For several reasons, this Court should reject the Fourth Circuit's reasoning, restore appropriate limits to the mail and wire fraud statutes, and vacate petitioners' convictions.

First, as explained in Petitioners' brief ("Pet. Br.") and in the brief *amici curiae* filed by NACDL and NAM in support of their petition for certiorari, the theory underlying petitioners' convictions is inconsistent with the methodology for interpreting the mail and wire fraud statutes set forth in *Cleve-*

land and *McNally*.[2] Second, given the complexity of foreign tax laws, the government's approach will ensure complicated and expensive evidentiary battles, burdening the courts, the Criminal Justice Act ("CJA") system, and litigants, and also create significant uncertainty for U.S. persons and companies doing business abroad. Third, a declaration that evasion of foreign taxes is actionable under the federal mail and wire fraud statutes will have dramatic repercussions throughout the criminal justice system, for it will make the same acts of evasion actionable under 29 of the state-law analogues to the federal RICO statute. Thus, contrary to the suggestions of the government and the Fourth Circuit, the federal executive will not have exclusive control over these claims; state and local prosecutors will be able to call on state courts to make definitive pronouncements concerning the contours and validity of foreign tax laws. Fourth, the decision below conflicts with the venerable canon of construction, most recently applied by this Court in *F. Hoffman-LaRoche Ltd. v. Empagran S.A.*, 124 S. Ct. 2359 (2004), that requires courts, absent clear contrary indication, to interpret statutes in a way that minimizes interference with the operation of foreign law. In light of all the foregoing indicators, there is no basis for concluding that Congress would have expanded the mail and wire fraud statutes in this manner without providing explicit guidance. This Court should therefore reverse and vacate petitioners' convictions.

ARGUMENT

In addressing petitioners' challenge to their convictions, the Fourth Circuit erroneously separated its analysis of the revenue rule from its interpretation of the wire fraud statute. The Fourth Circuit began by assuming, for the sake of argument, that Canada's asserted right to taxes constitutes "property" protected by the wire fraud statute, *see* Pet. App. 5a, and then decided that the revenue rule did not bar the prosecution of petitioners because it did not seek to enforce a tax judgment. *See* Pet. App.11a-12a. Then, without regard to the revenue rule, to any of the canons of construction that this Court has consistently applied in analogous circumstances, or to the practical consequences of its ruling, the Fourth Circuit concluded that a foreign government's right to collect tax revenue is "property" under the wire fraud statute. *See* Pet. App. 15a-16a. By inverting its analysis, the Fourth Circuit reached an erroneous and dangerous result.

The wire fraud statute contains no indication – let alone a "clear statement" – that Congress intended it to reach schemes to evade foreign tax obligations. Because the revenue rule prevents foreign sovereigns from recovering asserted tax obligations in U.S. courts, such obligations do not constitute "property" within the wire fraud statute. It would defy logic to conclude that a foreign government could have a property right to money that it does not have a legal right to recover from the defendant. Permitting prosecutions based on foreign tax evasion would vastly expand the scope of federal criminal jurisdiction, lead to complicated and difficult trials, create significant separation-of-powers problems, and interfere with foreign relations. Thus, construed in light of the revenue rule and basic canons of statutory interpretation – including the rule of lenity as applied in this Court's recent mail and wire fraud precedents – the wire fraud statute cannot reasonably extend to schemes to evade foreign taxes.

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[2] *See* Pet. Br. 37-46; Brief of the National Association of Manufacturers and National Association of Criminal Defense Lawyers as Amici Curiae at 7-8.

I. UNDER THIS COURT'S ANALYSIS IN *CLEVELAND* AND *McNALLY*, A FOREIGN GOVERNMENT'S ASSERTED RIGHT TO COLLECT TAXES UNDER ITS OWN LAWS IS NOT "PROPERTY" PROTECTED BY THE WIRE FRAUD STATUTE.

A. The Wire Fraud Statute Protects Only Traditional Forms of Property

This Court has repeatedly made clear that Congress intended the mail and wire fraud statutes to protect "property rights." *McNally v. United States*, 483 U.S. 350, 356 (1987) (mail fraud); *Carpenter v. United States*, 484 U.S. 19, 28 (1987) (wire fraud). This Court has also emphasized that the scope of "property" should be narrowly construed: "There are no constructive offenses; and before one can be punished, it must be shown that his case is plainly within the statute." *McNally*, 483 U.S. at 360 (quoting *Fasulo v. United States*, 272 U.S. 620, 629 (1926)). In *McNally*, this Court refused to read the statute in a way that "leaves its outer boundaries ambiguous and involves the Federal Government in setting standards of disclosure and good government for local and state officials," and therefore declared that § 1341 is "limited in scope to the protection of property rights" and that without "clear and definite language" from Congress, this Court will not select a "harsher" reading of a criminal statute that expands federal criminal law. *Id.* In *Cleveland*, this Court reiterated and expanded the same message, providing a detailed methodology for interpreting "property" in the mail and wire fraud statutes. Relying on the legislative history of the mail and wire fraud statutes, this Court rejected "the Government's theories of property rights [which] stray from traditional concepts of property." 531 U.S. at 24.[3]

[3] As discussed in petitioners' brief, this Court has also explained that the mail and wire fraud statutes incorporate the common law elements of fraud and its background. *See* Pet. Br. 32-33 (citing *Neder v. United States*, 527 U.S. 1, 23-25 (1999)). As a foreign sovereign would not have been able to assert a common law fraud claim based on the asserted loss of tax revenue - and, indeed, cannot do so today, *see Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 130-34 (2d Cir. 2001), *cert. denied*, 537 U.S. 1000 (2002); *Republic of Honduras v. Philip Morris Cos.*, 341 F.3d 1253, 1258 (11th Cir. 2003) - this discussion confirms the conclusion that the wire fraud statute may not be read to include the alleged evasion of foreign taxes.

In short, this Court explained that the "property" protected by these statutes must be understood in terms of "traditional concepts of property" and that any ambiguity in its meaning "should be resolved in favor of lenity." 531 U.S. at 25. This Court also made clear that it will not "approve a sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Id.* at 24. Finally, the Court clarified that the only schemes prohibited by the mail and wire fraud statutes are those that aim to take "property" that is "in the hands" of the victim. *Id.* at 15. Thus, according to this Court's clear direction, before allowing a prosecution under the mail and wire fraud statutes, courts must assure themselves that the alleged scheme seeks to take away clearly defined "property" that is already in the hands of the victim, and that Congress gave clear indication of its intent to criminalize the conduct. Any ambiguity must be resolved in favor of lenity. The asserted property interest underlying petitioners' conviction – Canada's purported right to collect unassessed duties on imported liquor – fails this Court's definition of "traditional theories of property" at every turn.

B. The Government Has Effectively Conceded That Canada's Interest In Unassessed Liquor Duties Is Not "Property"

The government, by its conduct in this case, effectively conceded that the Canadian government lacked any property interest protected by the wire fraud statute. The Mandatory

Victims Restitution Act removes any discretion from the sentencing court, requiring it to impose a restitution order following conviction for wire fraud, directing the defendant to return "the property" to the "victim" or the "owner."[4] The government, however, did not seek a restitution order in this case, stating that such an award was "not appropriate in this case since the victim is a foreign government and the loss derives from tax laws of the foreign government." *See* Govt's Statement of Facts and Applicable Sentencing Factors at 3 (Feb. 16, 2001). Thus, the government in effect conceded that, whatever Canada's interest in uncollected taxes, that interest was not "property" under the restitution statute. This concession is fundamentally at odds with the claim that Canada's unassessed taxes are "property" protected by the wire fraud statute.

As § 3663A(c)(1)(A)(ii) refers specifically to "any offense committed by fraud or deceit," it makes no sense to give the word "property" one meaning for the substantive offense and another for sentencing purposes. *Cf. Gustafson v. Alloyd Co.*, 513 U.S. 561, 570 (1995) ("identical words used in different parts of the same act are intended to have the same meaning" (quotation and citations omitted); "[i]f the contract before us is not a prospectus for purposes of §

[4] *See* 18 U.S.C. § 3663A(b)(1)(A) (where offense results in loss of "property," defendant must "return the property to the owner"); § 3663A(c)(1)(A)(ii) (mandating restitution if the crime is "an offense against property under this title . . . including any offense committed by fraud or deceit"); § 3663A(c)(1)(B) (mandating restitution for crimes "in which an identifiable victim or victims has suffered . . . pecuniary loss"); *see also United States v. Bright*, 353 F.3d 1114, 1120 (9th Cir. 2004) (18 U.S.C. § 3663A(c)(1)(A)(ii) mandates restitution for mail fraud offenses); *United States v. Vanhorn*, 344 F.3d 729, 730 (8th Cir. 2003) (same), *cert. denied*, 124 S. Ct. 1700 (2004); *United States v. Hasson*, 333 F.3d 1264, 1275 (11th Cir. 2003) (mandating restitution for mail and wire fraud pursuant to § 3663A(c)(1)(B)), *cert. denied*, 124 S. Ct. 2195 (2004); *United States v. Coriaty*, 300 F.3d 244, 252 (2d Cir. 2002) (restitution mandatory under 18 U.S.C. § 3663A(c)(1)(A)(ii) for wire fraud).

10 [of the Securities Act] -- as all must and do concede -- it is not a prospectus for purposes of § 12 either"). As the government's position at sentencing shows, its theory of "property" strayed far from "traditional" forms of property protected by the mail and wire fraud statutes, which were designed "to prevent the frauds which are mostly gotten up in the large cities . . . by thieves, forgers, and rapscallions generally, for the purpose of deceiving and fleecing *the innocent people in the country*." *See McNally*, 483 U.S. at 356 (quoting Cong. Globe, 41st Cong., 3d Sess., 35 (1870) (remarks of Rep. Farnsworth)) (emphasis added).

C. The Revenue Rule Bars Any Inference That Canada's Unassessed and Uncollected Liquor Duties Are Property.

Even if the Canadian government has a right to payment under Canadian law, the well-established common law revenue rule nevertheless bars it from enforcing that right in the courts of the United States. Courts – even those that have upheld convictions like petitioners' – have uniformly acknowledged that a foreign sovereign may not enforce its tax judgments in the courts of this country.[5] Indeed, there is general agreement that the revenue rule has firm roots in the common law and that any court can invoke it to prevent a foreign sovereign from enforcing its revenue laws within its jurisdiction. *See* Pet. Br. 7-13.

The doctrine was, in fact, "so well recognized" that it was not until the 1970's – well after passage of both the mail and wire fraud statutes – that a foreign government sued in an American court to enforce a foreign tax judgment. *See Her Majesty v. Gilbertson*, 597 F.2d 1161, 1164 (9th Cir. 1979). Even in that case, the court refused to enforce the

[5] *See United States v. Pasquantino*, Pet. App. 5a-7a; *see also United States v. Trapilo*, 130 F.3d 547, 552-53 (1997) (reversing dismissal of indictment).

judgment, saying that the revenue rule "has been with us for centuries and as such has become firmly embedded in the law." *Id.* at 1166. Indeed, numerous commentators have recognized that foreign sovereigns may not invoke the jurisdiction of a U.S. court to collect on a tax judgment. *See generally*, Adrian Briggs, *The Revenue Rule in the Conflict of Laws: Time for a Makeover*, 2001 Sing. J. Legal Stud. 280 (2001); *Extraterritorial Collection of State Inheritance Taxes*, 29 Col. L. Rev. 782 (1929); Nathaniel L. Goldstein, *Interstate Enforcement of Tax Laws of Sister States*, 30 Taxes 247 (1952); Robert A. LeFlar, *Extrastate Enforcement of Penal and Governmental Claims*, 46 Harv. L. Rev. 193 (1932); Charles F. Midkiff, Note, *Extraterritorial Enforcement of Tax Claims*, 12 Wm. & Mary L. Rev. 111 (1970).[6]

In light of the courts' consistent refusal to enforce any foreign government's "right" to collect tax revenue in an American courtroom, the inescapable conclusion is that such a "property right" does not exist at common law or under the laws of the states. *See Ruckelshaus v. Monsanto Co.*, 467 U.S. 986, 1001 (1984) ("'[p]roperty interests . . . are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state

[6] The government argues that because courts have upheld mail and wire fraud prosecutions for evasion of U.S. state and federal taxes means that, "by its terms, the wire fraud statute applies to schemes to defraud foreign governments of tax revenue." Brief of the Solicitor General in Opposition to Certiorari ("Cert. Opp.") at 6-7 (citing *United States v. Goulding*, 26 F.3d 656, 663 (7th Cir.), *cert denied*, 513 U.S. 1061 (1994); *United States v. Dale*, 991 F.2d 819 (D.C. Cir.), *cert. denied*, 510 U.S. 906 (1993); *United States v. Helmsley*, 941 F.2d 71, 94 (2d Cir. 1991), *cert. denied*, 502 U.S. 1091 (1992), *United States v. Melvin*, 544 F.2d 767 (5th Cir.), *cert. denied*, 430 U.S. 910 (1977); *United States v. Brewer*, 528 F.2d 492 (4th Cir. 1975)). There are two problems with the government's position. First, it ignores the tremendous difference the revenue rule draws between domestic and foreign taxes. Second, these cases it cites do not appear to survive *Cleveland's* requirement that the defendant, through his scheme, obtain property that is "in the hands" of the victim. 531 U.S. at 15.

law'") (quoting *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 161 (1980) (quoting *Bd. of Regents v. Roth*, 408 U.S. 564, 577 (1972))). Simply put, a person can depart from a foreign jurisdiction with proceeds to which the foreign government claims a right under its revenue laws, and American courts will not enforce the sovereign's right to collect the money. *See Gilbertson*, 597 F.2d at 1162-63.

The lower courts' discussions of whether the revenue rule is permissive or mandatory, and whether the policies that underlie it are valid or antiquated, have little bearing on the viability of this prosecution. Because Congress enacted the wire fraud statute against this common law backdrop forbidding the enforcement of foreign tax judgments in U.S. courts, longstanding canons of statutory construction compel the conclusion that the revenue rule was unaffected. *See Shaw v. R.R. Co.*, 101 U.S. 557, 565 (1880) ("No statute is to be construed as altering the common law, farther than its words import. It is not to be construed as making any innovation upon the common law which it does not fairly express."). As the Canadian government could not have enforced its purported right to collect taxes against any of the petitioners in any U.S. court, that right can scarcely fall within the "traditional concepts of property" held in *Cleveland* to be enforceable under the wire fraud statute. In short, the Canadian government had no property or enforceable property right in its hands.

D. Interpreting "Property" To Include Uncollected and Unassessed Foreign Tax Revenues Would Create a Sweeping Expansion of the Federal Criminal Jurisdiction.

It is plain that the theory of this prosecution would work a "sweeping expansion of federal criminal jurisdiction in the absence of a clear statement by Congress." *Cleveland*, 531 U.S. at 24. Under the government's theory, any use of the United States mail or wires as part of an effort to evade for-

eign taxes would be subject to criminal prosecution in the United States. Thus, even acts of tax evasion treated by foreign law as *civil* violations would be criminally punishable in the United States. Opening the U.S. criminal justice system to any use of the mail or wires in furtherance of foreign tax evasion – civil or criminal – unquestionably represents a vast expansion of federal criminal jurisdiction, but there is no indication, let alone a "clear statement," that Congress intended such a result.

When Congress wants to make the violation of the civil or criminal laws of another nation an element of a federal criminal offense, it knows how to do so unambiguously, with clear language that leaves no doubt as to its intentions. *See, e.g.*, 16 U.S.C. § 1372(c)(1)(B) (making it illegal to import a marine mammal "taken in another country *in violation of the law of that country*") (emphasis added); 16 U.S.C. § 1372(c)(2)(B) (banning the import of any marine mammal product if "the sale in commerce of such product *in the country of origin* of the product is illegal") (emphasis added); 18 U.S.C. § 1956(c)(1) ("the term 'knowing that the property involved in a financial transaction represents the proceeds of some form of unlawful activity' means that the person knew the property involved in the transaction represented proceeds from some form, though not necessarily which form, of activity that constitutes a felony under State, Federal, or *foreign law*") (emphasis added); 18 U.S.C. § 2313(a) ("[w]hoever receives, possesses, conceals, stores, barters, sells, or disposes of any motor vehicle or aircraft, which has crossed a State or United States boundary after being stolen . . ."); 16 U.S.C. § 3372(a)(2)(A) (banning the importation of wildlife which has been "taken, possessed, transported, or sold *in violation of any . . . foreign law*") (emphasis added). The wire fraud statute contains no such explicit statement to incorporate foreign revenue rules. To the contrary, there is nothing on the face of the wire fraud statute that implicates

issues of foreign law, or suggests that a violation of foreign tax law could trigger its provisions.

E. The Rule of Lenity Requires an Interpretation of Property That Excludes Unassessed and Uncollected Foreign Tax Revenues.

Under *McNally* and *Cleveland*, the rule of lenity requires an interpretation of the wire fraud statute that excludes unassessed and uncollected foreign tax revenues from its ambit. This "venerable principle," *Moskal v. United States*, 498 U.S. 103, 131 (1990) (Scalia, J., dissenting), requires that "ambiguity concerning the ambit of criminal statutes should be resolved in favor of lenity." *Rewis v. United States*, 401 U.S. 808, 812 (1971). This Court has "[i]n various ways over the years . . . stated that 'when choice has to be made between two readings of what conduct Congress has made a crime, it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite.'" *United States v. Bass*, 404 U.S. 336, 347 (1971) (quoting *United States v. Universal C.I.T. Credit Corp.*, 344 U.S. 218, 221-22 (1952)). Justice Scalia's dissent in *Moskal* states succinctly what has been an unwavering principle of construction for federal criminal statutes: "[t]he temptation to stretch the law to fit the evil is an ancient one, and it must be resisted." 498 U.S. at 132.

Both *McNally* and *Cleveland* relied on this rule to constrain the federal government's attempts to expand the scope of "property" in the fraud statutes. *See Cleveland*, 531 U.S. at 25 ("In deciding what is 'property' under § 1341, we think 'it is appropriate, before we choose the harsher alternative, to require that Congress should have spoken in language that is clear and definite'") (quoting *Universal C.I.T. Credit Corp.*, 344 U.S. at 222); *McNally*, 483 U.S. at 360 ("Rather than construe the statute in such a manner that leaves its outer boundaries ambiguous . . . we read § 1341 as limited in

scope to the protection of property rights. If Congress desires to go further, it must speak more clearly than it has").

In this usual case, the government has essentially argued that the definition of "property" in the fraud statutes has two meanings – one when it attempts to prosecute individuals for schemes to evade foreign tax laws but a different, more limited definition (reflecting the common law revenue rule) when foreign governments attempt to collect civil judgments under the RICO statute. *See* Brief for the United States as Amicus Curiae at 7, 16, *Attorney General of Canada v. R.J. Reynolds Tobacco Holding, Inc.* (S. Ct. case no. 01-1317) (Oct. 2002). To accept such an approach would stand the rule of lenity on its head. Even if one could conclude that there is an open question about Congress' intentions, the rule of lenity forbids split meanings of this sort; rather, this Court must adopt the narrower reading of the statute. Following this Court's directive in *McNally* and *Cleveland*, the Fourth Circuit should have required Congress to "speak more clearly than it has" before the courts may interpret the definition of "property" to encompass a property right that cannot be enforced in an American court under the laws of the states and the common law. *McNally*, 483 U.S. at 360.

II. OTHER FACTORS AND CANONS OF CONSTRUCTION COUNSEL AGAINST READING FOREIGN TAX OBLIGATIONS AS PROPERTY UNDER THE FRAUD STATUTES.

Although the analytical framework set forth in *Cleveland* and applied above provides sufficient reason to reject the government's reading of the wire fraud statute, additional factors and canons of construction provide further support for this result. Permitting wire fraud prosecutions based upon alleged schemes to evade foreign taxes will (1) create unwieldy prosecutions burdening courts, juries, defendants, and the CJA system with complicated and expensive proof of the contours of foreign law, while creating substantial uncer-

tainty about prohibited conduct; (2) raise significant separation-of-powers concerns and create friction with foreign governments; and (3) violate established canons of statutory construction designed to minimize interference and friction with foreign sovereigns. To avoid such undesirable results, this Court should read the wire fraud statute as excluding alleged schemes to evade foreign taxes.

A. This Court Should Construe The Wire Fraud Statute Narrowly Due To The Inherent Difficulty In Proving The Contours Of Foreign Tax Law And The Uncertainties That Tax-Based Wire Fraud Prosecutions Will Create.

Because the burdens and vagaries of ascertaining and proving foreign law are substantial – even on issues far simpler than tax and revenue rules – this Court should interpret statutes to incorporate foreign law as part of an offense only when Congress has provided an unambiguous statement that it so intended. The experience of the courts with ascertaining foreign law, even in instances when Congress explicitly incorporates the foreign law, is instructive. These experiences do not suggest that Congress may never incorporate foreign law as an element of a federal criminal offense, or even that it is necessarily unwise as a matter of policy to do so. Rather, they illustrate that incorporating foreign law has serious consequences because pleading and proving foreign law is unpredictable and imposes burdens on the courts, juries, the parties, and the public fisc. Appropriately, Congress has incorporated foreign law sparingly. Courts should likewise hesitate to read foreign law into criminal offenses absent an unambiguous instruction from Congress.

1. Proving Foreign Law Creates Numerous Problems for Courts and Litigants

Under Federal Rule of Criminal Procedure 26.1, the party invoking foreign law must provide notice and bears the burden of proving foreign law. Proving that law is often

very complicated and expensive for the parties and burdensome for the courts. Although *United States v. BCCI Holdings (Luxembourg), S.A.*, 977 F. Supp. 1 (D.D.C. 1997), involved civil proceedings, it illustrates this problem. There, the parties retained no fewer than *six* experts to opine on Bangladeshi banking law to determine under what circumstances a Bangladeshi bank obtains right, title and interest to foreign exchange held by authorized dealers. These experts included a former Bangladeshi Supreme Court Justice and former Bangladesh cabinet officials. *Id.* at 8-9 & nn.11 – 14, 17-18.

United States v. McNab, 331 F.3d 1228 (11th Cir. 2003), *cert. denied*, 124 S. Ct. 1406 (2004), provides a vivid illustration of the difficulties in obtaining a clear picture of foreign law on even relatively simple issue of animal importation (as opposed to revenue laws). In this prosecution under the Lacey Act, which prohibits the importation of wildlife which has been "taken, possessed, transported, or sold in violation of any . . . foreign law," 16 U.S.C. § 3372(a)(2)(A), the government claimed that the defendants had imported lobsters that had been taken and packaged in ways that violated the laws and/or regulations of Honduras. In particular, the government claimed that Honduran law prohibited taking egg-bearing lobsters and lobsters with tails smaller than 5.5 inches. *See* 331 F.3d at 1233. To establish this apparently straightforward proposition of Honduran law, the parties presented at least five testifying experts, including the "highest-ranking legal official" in the relevant Honduran ministry (who testified for the prosecution) and two law professors – "both experts in Honduran law," *id.* at 1234 & n.7 - who testified for the defendants. The defense also presented legal opinions from members of the Honduran legal community, including the attorney general of Honduras and a regional prosecutor, and a declaration from a practicing Honduran attorney. *Id.* at 1234 n.7. The government received guidance in the course of its investigation and prosecution

from approximately nine additional Honduran government officials, all putative experts on Honduran export laws who attested to the validity of one of the Honduran laws at issue and the fact that the defendants violated it. *Id.* at 1232-35. Ultimately, all of the government's experts proved to be wrong in their assessments. In the courts of Honduras, the defendants successfully challenged the validity of the Honduran regulations underlying their convictions. In the end, even the Embassy of Honduras supported the defendants on appeal with a brief *amicus curiae*. *Id.* at 1240 n.23. *See infra* at 21-23, 28.

Although the parties in *McNab* and *BCCI Holdings* were able to shoulder the vast financial expense of obtaining extensive expert testimony, many criminal defendants will lack the means to do so. Under the CJA, 18 U.S.C. § 3006A(e)(3), there is a presumptive limit of $1,000.00 to compensate any expert approved by the court.[7] Experts on foreign revenue laws will certainly exhaust those limits in every instance. Thus, defendants may face substantial difficulties in presenting defenses based on foreign law. Even if courts authorize defendants to exceed the meager limits set forth in the CJA, the cost of such experts will then fall on the public at large.

2. Proving Foreign Tax Law Would Create Additional Complications and Burdens.

If it is difficult and burdensome to ascertain and prove the contours of foreign law in regulations concerning the size of lobsters, tax and revenue laws present even greater problems. Laws of this kind are full of subtle distinctions and gray areas; the scope and gradations of tax evasion and the lines of demarcation between criminal and civil tax liability

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[7] This Court should not presume that prosecutions for evasion of foreign taxes will fall only on the wealthy. This case is evidence to the contrary; petitioners were indigent and benefited from appointed counsel and the CJA system. *See* J.A. 20-26 (docket sheet indicating CJA applications).

are complicated and continually changing. Indeed, this Court has noted the "complexity of [U.S.] tax laws," and explained that "[t]he proliferation of statutes and regulations has sometimes made it difficult for the average citizen to know and comprehend the extent of the duties and obligations imposed by the tax laws." *Cheek v. United States*, 498 U.S. 192, 199-200 (1991); *see also United States v. Bishop*, 412 U.S. 346, 360 (1973) ("In our complex tax system, uncertainty often arises even among taxpayers who earnestly wish to follow the law"). Even the IRS, "whose institutional response to technically complex laws is an abysmally low rate of correct answers to telephone queries" (approximately 76 percent in 1990), has patent difficultly understanding U.S. tax law.[8] This "complexity" has led Congress to "soften[] the impact of the common-law presumption by making specific intent to violate the law an element of certain federal criminal tax offenses." *Cheek*, 498 U.S. at 200. No less a legal mind than Judge Learned Hand confessed to confusion in dealing with U.S. tax law:

> [T]he words of such an act as the Income Tax, for example, merely dance before my eyes in a meaningless procession: cross-reference to cross-reference, exception upon exception—couched in abstract terms that offer no handle to seize hold of—leave in my mind only a confused sense of some vitally important, but successfully concealed purport, which it is my duty to extract, but which is within my power, if at all, only after the most inordinate expenditure of time.

Learned Hand, *Thomas Walter Swan*, 57 Yale L.J. 167, 169 (1947).

[8] Edward J. McCaffery, *The Holy Grail Of Tax Simplification*, 1990 Wis. L. Rev. 1267, 1271 n.19 (citing Robert Hershey, *Creaky I.R.S. is at a Crossroads*, N.Y. Times, Apr. 7, 1990, at 33).

Given the complexities of U.S. tax law, analysis of less familiar foreign tax laws would necessarily pose an even greater challenge to U.S. courts, juries, and litigants. One such obstacle may arise in discerning the contours of tax avoidance. Although acts of tax *fraud* may be unambiguous in many cases, the scope of tax *avoidance* is largely a matter of degree, and differs widely from country to country.[9] Thus, if the evasion of foreign taxes becomes a predicate for mail and wire fraud offenses, U.S. courts will have to develop expertise about the operation and effect of foreign revenue laws (comparable in complexity to our own tax laws) to ascertain whether the foreign sovereign actually had a property right to the tax revenue alleged.

If the government's theory of the wire fraud statute prevails, it will have to establish that defendants intended to evade foreign taxes. Because the mail and wire fraud statutes are specific intent crimes, *see, e.g., United States v. McCann*, 366 F.3d 46, 51 (1st Cir. 2004) (mail fraud); *United States v. Shipsey*, 363 F.3d 962, 971 (9th Cir. 2004) (wire fraud), this showing will require proof that a tax obligation was due and that the defendant intended to evade or assist in the evasion of that obligation. Thus, in every case the defendant will be able to offer evidence of good faith belief in compliance with the foreign tax or revenue laws. As a result, juries will often have to make determinations about the scope and operation of foreign law and defendants' intentions concerning foreign law. *See United States v. Gaudin*, 515 U.S. 506, 522-23 (1995) (discussing defendant's Fifth and Sixth Amendment rights "to have a jury determine, be-

[9] *See* Bruce Zagaris, *Avoiding Criminal Liability In The Conduct Of International Business*, 21 Wm. Mitchell L. Rev. 749, 804 (1996)(citing 68a Cahiers De Droit Fiscal International [Studies on International Fiscal Law] (1983)(A survey concluded that it is not possible to identify with reasonable certainty the common criteria or underlying concepts of evasion analysis)).

yond a reasonable doubt, his guilt of every element of the crime with which he is charged"). In the absence of admissions on the issue of intent, the prosecution will likely need to prove this element by establishing for the jury the contours of the foreign tax law and showing that, under the circumstances, the defendant could only have intended to defraud the foreign sovereign. To prove good faith, defendants will be entitled to offer expert testimony to explain to the jury any ambiguities in the law at issue, and that their positions are legitimate, or within the bounds of reason. In short, the jury can only make a determination that the defendant acted with specific intent if it finds beyond a reasonable doubt both (a) the foreign law was clear and unambiguous, and (b) a person in the defendant's shoes must have known he was violating that law. *Cf. United States v. Regan*, 937 F.2d 823, 827 (2d Cir. 1991) ("the issue for the jury was not how the district court interpreted [26 U.S.C. §] 1058; it was how the defendants in good faith interpreted it").[10]

Given the diversity and complexity of foreign revenue laws, advancing claims and defenses of these kinds will require courts and parties to obtain a level of understanding of foreign laws and legal systems that will be prohibitively difficult and expensive to achieve. For example, some countries, such as Greece, Brazil, Argentina and Italy, consider non-arm's-length transactions to be tax evasion.[11] Nonresident taxpayers could be charged with tax evasion where their investment income was taxed at source or where capital gains tax was applied to the disposal of real estate or share-

[10] Although the government may argue that the determination of the foreign law is for the judge in a preliminary hearing under Fed. R. Crim. P. 26.1, and not the jury, any other result would deprive the defendant his rights under the Confrontation Clause, as well his right to have the jury determine "all elements of the crime."

[11] *See* Zagaris, *supra*, at 807.

holdings.[12] Other countries "have enacted ad hoc provisions to counteract illegitimate reductions of tax burdens when the taxable objects or subjects cross national boundaries."[13] For instance, Canada imposes a "departure tax" on a taxpayer who ceases to be a Canadian resident and has "disposed of the whole of his assets (other than property remaining subject to Canadian taxation) at their fair market value at the time of his emigration."[14] A U.S. court would be required to interpret such diverse and complex foreign tax laws to determine whether the foreign sovereign actually had a property right which gave rise to liability under the wire fraud statue. These exercises will make the prosecution of such cases extraordinarily cumbersome and expensive.

3. Resting Wire Fraud Prosecutions on Foreign Tax Evasion Will Create Unfairness For Litigants and Provide Inadequate Notice of the Elements of the Offense.

In addition to these inevitable problems of proof, prosecuting fraud claims based on foreign tax law guarantees uncertainty and threatens significant unfairness to litigants. In particular, if the fraud statute covers the failure to pay foreign taxes, it will be extremely difficult for U.S. individuals and businesses to predict with any confidence exactly what behavior that statute prohibits.

As discussed above, *see supra* at 15-20, U.S. tax law is exceedingly complicated and gives rise to a host of honest mistakes and disagreements about its scope and appropriate exemptions and deductions. *See Spies v. United States*, 317 U.S. 492, 496 (1943) (recognizing that U.S. tax laws create "problems of great complexity, and innocent errors are numerous," as evidenced by the vast number of overpayments

[12] *Id.*

[13] *Id.*

[14] *Id.*

received by the I.R.S. each year). Given the acknowledged difficulty in interpreting U.S. tax law, it is nearly impossible to predict how a U.S. court might apply a foreign revenue law. As *McNab* makes clear, even foreign legal authorities often differ about the interpretation of their own laws. Thus, when foreign tax laws are not applied consistently even by courts in their countries of origin, it will be difficult for businesses with international operations to make long-term business plans. The fact that the unintentional violation of an obscure foreign tax law could result in criminal penalties under the wire fraud statute could have chilling implications for all U.S. businesses that are involved in international transactions. Equally disturbing is the notion that the question of whether or not such a foreign tax law actually gives rise to any tax liability would be determined by a U.S. court's interpretation of the foreign law. Similarly, defendants would be sentenced on the basis of a federal court's estimation as to how much in taxes would have been owed under the foreign revenue law.[15] In today's climate of corporate skepticism, the mere possibility of such criminal liability may have a significant *in terrorem* effect that prevents U.S. companies from taking legitimate positions regarding their foreign tax liability, thus putting them at a competitive disadvantage to foreign competitors. Worse, businesses that take legitimate but aggressive positions with respect to their foreign tax liabilities could ultimately face criminal prosecution for failing to predict how a U.S. Court would interpret the foreign revenue laws that govern their conduct. This Court should reject an interpretation of the wire fraud statute that creates such uncertainties.

Finally, incorporating foreign tax laws as predicate offenses to federal criminal statutes is also a dangerous exercise because it creates a host of pitfalls for defendants, even those who successfully contest the validity of the foreign law. For example, in *McNab*, although the defendants ultimately convinced a Honduran court of the invalidity of one of the Honduran administrative laws that provided the predicate for their conviction under the Lacey Act, their U.S. convictions were affirmed.

[15] *See* Pet. App. 24a-26a; *see supra* § I.B discussing Mandatory Victims Restitution Act, requiring that sentencing court order the defendant to return the property of which the victim was defrauded.

Although the Honduran ruling had retroactive effect under the Honduran constitution, and would have invalidated any convictions in Honduras, 331 F.3d at 1249, the Eleventh Circuit nonetheless affirmed the convictions because, according to the government's testifying expert, the predicate Honduran law offense was an administrative rather than a criminal matter and thus was not entitled to retroactive effect. *Id.* at 1243 & n.29. Although they were consistently right on foreign law before trial and obtained a definitive statement from the Honduran court that the predicate *administrative* offense was null and void, defendants' U.S. *criminal* convictions and sentences of 97 months and 24 months stood unaffected. As the dissent noted, "had U.S. law been implicated, reversal of the convictions would not be in question and the case would easily be resolved in the defendants favor. In the United States, where a substantive criminal law is subsequently declared to be invalid by the courts, any convictions thereon would be reversed." *Id.* at 1248-49 (Fay, J., dissenting).

Furthermore, foreign tax law operates as part of a broader legal system that accomplishes the foreign legislature's objectives through the balance of that country's procedural and constitutional protections. Application and interpretation by a U.S. court of foreign revenue laws would necessarily strip the defendant of those protections or put the court in a position of interpreting the foreign country's con-

stitution and procedural laws as well.[16] For example, a Canadian citizen might expect that if prosecuted for alleged violations of a Canadian law, a Canadian Court would interpret and apply the law subject to Canadian procedural and constitutional safeguards. But under the Fourth Circuit's view of the wire fraud statute, the United States government could prosecute citizens of other countries for the alleged violations of their home country's tax laws without providing them the procedural protections that would otherwise be available in their home country. This could have the bizarre result of a defendant being incarcerated in the U.S. for violating a foreign statute that would not have resulted in his conviction were he tried in his home country, where the law was originally enacted.

B. Construing The Fraud Statutes To Reach Schemes To Evade Foreign Taxes Would Create Significant Separation Of Powers Problems.

Both the Fourth Circuit and the government have argued that mail and wire fraud prosecutions based upon alleged schemes to evade putative foreign tax obligations do not "implicate the separation-of-powers considerations that underlie the revenue rule." Cert. Opp. 7-8 (citing Pet. App. 14a). Although the court below and the government acknowledge that "courts are ill-equipped to decide when foreign governments should be permitted to enforce their revenue laws in this country and that such judgments are more appropriately made by the legislative and executive branches of the government," Cert. Opp. 7-8; *see also* Pet. App. 14a, they conclude that this case does not raise such a concern

[16] For example, in *Madanes v. Madanes*, 186 F.R.D. 279, 286 (S.D.N.Y. 2001), the court noted that Argentina grants its citizens a right against self-incrimination that is broader than that granted by the United States constitution. "Thus, it is contrary to Argentina's national interest if its citizens' rights are circumvented when the are sued in forums where those rights are not recognized". *Id.*

because the Executive Branch has "legislative authorization" to bring a federal wire fraud prosecution of this kind and will do so "only when the Executive Branch decides that it is in the interest of the United States." Cert. Opp. 8; *see also* Pet. App. 14a ("[T]o the extent matters of foreign policy were implicated by prosecution of the Defendants . . . such matters were passed upon by the only two branches of our federal government charged by our Constitution with the power to make foreign policy decisions."). At a minimum, the Fourth Circuit's reading raises a serious constitutional question of separation powers, and should therefore be rejected. *See Ashwander v. Tenn. Valley Auth.*, 297 U.S. 288, 347 (1936) (Brandeis, J., concurring) (articulating principle of narrow statutory construction to avoid constitutional problems). For four reasons, these arguments are unconvincing.

First, contrary to the government's entirely unsupported assertion, there is no evidence of "legislative authorization" for the executive and judiciary to take upon themselves the delicate task of interpreting the revenue and penal laws of foreign sovereigns. The Fourth Circuit found such authorization in the fact that "Congress enacted the wire fraud statute." Pet. App. 14a. But that logic is circular, for there is no indication in the text of the mail and wire fraud statutes, or even in their legislative histories, that Congress intended to abrogate or create an exception to the venerable common law revenue rule, thereby authorizing prosecutions for schemes to evade foreign taxes. Indeed, as discussed in detail in petitioners' brief, the most relevant evidence from Congress – applicable legislation and treaties – all point in the other direction, suggesting that Congress envisioned a fundamentally different approach to the vindication of Canada's interests in cases like these. *See* Pet. Br. 46-51 (discussing laws and treaties aimed at smuggling and reciprocal assistance in enforcing tax laws).

Second, even if the Executive Branch screens cases and initiates prosecutions only when it "decides that it is in the interest of the United States to do so," Cert. Opp. 8, that assurance does little to alleviate the substantial foreign policy and separation-of-powers concerns that arise when the judiciary adjudicates claims that implicate foreign tax law.[17] As explained in petitioners' brief, the revenue rule seeks to avoid the diplomatic friction and embarrassment that results when the courts of one nation reject the tax or revenue laws of another, or call into question another government's view of its own laws. *See* Pet. Br. at 12-13. Even if the Executive Branch should determine before bringing a prosecution that its view of a foreign tax law is consistent with the views of the foreign government, the Executive Branch cannot be sure that a judge or jury will regard the foreign tax law in the same way. As discussed above, *see supra* at 15, Federal Rule of Criminal Procedure 26.1 makes clear that the trial court must determine the scope and contours of foreign law. Courts are of course free to disagree with the views of the Executive, and juries are entitled to acquit if they view the operation of foreign law as unjust. Thus, the Executive Branch has no way to ensure that a wire fraud prosecution grounded in an asserted violation of foreign tax law will not result in the rejection or misinterpretation of foreign law. By

[17] The government's assurance that it will screen cases using some undisclosed criteria to protect the interests of the United States is troubling for a separate reason: It provides no guidance whatsoever for potential defendants. As discussed above, *see supra* § II.A(1)(2), the complexities of foreign tax and revenue laws already make it difficult to predict in advance what types of conduct might fall within the government's reading of the wire fraud statute. The government's indication that it intends to prosecute only a subset of those cases, selected pursuant to undisclosed guidelines, is the essence of arbitrary and discriminatory enforcement. Standards for prosecution must reside in plain view, within the law itself. *See Grayned v. City of Rockford*, 408 U.S. 104, 108 (1972) ("It is a basic principle of due process that an enactment is void for vagueness if its prohibitions are not clearly defined.").

bringing prosecutions of this kind, the Executive Branch places the interpretation of foreign tax laws in the hands of decisionmakers over whom it has no control, creating a substantial risk of precisely the kinds of harms that the revenue rule seeks to avoid.

Third, even if the Executive Branch were able to limit offense to foreign governments by controlling federal wire fraud prosecutions based on foreign tax evasion, it could do little to exercise the same kind of control over prosecutions brought by state and local prosecuting authorities under state law analogues to RICO. Some twenty-nine of these statutes use federal mail and wire fraud as a predicate offense. *See* Artie Jones, et al., *Racketeering Influenced and Corrupt Organizations*, 39 Am. Crim. L. Rev. 977, 978 n.1 (2002). Accordingly, if this Court determines that schemes to evade foreign taxes are actionable federal mail and wire fraud, it will effectively give rise to twenty-nine different crimes under state law. Neither the federal Executive, nor the federal courts, will have any authority to restrain prosecutions of this kind. The prospect of the courts of twenty-nine different states opining about the interpretation, operation, and validity of the revenue laws of different countries illustrates the importance of construing the mail and wire fraud statutes narrowly, in adherence to the common law revenue rule.

Finally, the recognition of foreign tax evasion as a basis for federal mail and wire fraud also raises the possibility that private plaintiffs may bring civil RICO claims based upon alleged acts of foreign tax evasion.[18] Like criminal prosecu-

[18] This Court has certainly allowed civil RICO claims are appropriate where a plaintiff claims to have suffered competitive harm from a defendant's ability to reduce its costs by conducting business through predicate acts. *See Sedima, S.P.R.L. v. Imrex Co.*, 473 U.S. 479, 497 n.15 (1985) (approving examples provided by dissent). The government may also argue that federal mail and wire fraud prosecutions for foreign tax evasion are *sui generis*, do not give rise to private rights of action or criminal liability under state laws. *Cf. Attorney Gen. of Canada*, 268 F.3d at 122-

tions under state RICO analogues, these private civil claims would stand beyond the control of the federal government, and would require federal courts to interpret and pass upon the validity of foreign tax laws. For this reason, civil RICO claims using this type of mail and wire fraud as a predicate act presents the same separation-of-powers problem and the same risks of substantial damage to foreign relations.

C. The Fourth Circuit's Approach Requires U.S. Courts To Pass Judgment On Foreign Tax Laws, In Violation Of Established Precedent Rejecting Interpretations Of U.S. Law That Interfere With Foreign Governments.

As this Court has repeatedly explained and very recently reiterated, it is ordinarily appropriate to "construe[] ambiguous statutes to avoid unreasonable interference with the sovereign authority of other nations." *F. Hoffman-LaRoche*, 124 S. Ct. at 2366; *see also EEOC v. Arabian Am. Oil Co.*, 499 U.S. 244, 248 (1991) (discussing longstanding principle of American jurisprudence "that legislation of Congress, unless a contrary intent appears, is meant to apply only within the territorial jurisdiction of the United States") (quoting *Foley Bros., Inc. v. Filardo*, 336 U.S. 281, 285 (1949)). "This rule of statutory construction cautions courts to assume that legislators take account of the legitimate sovereign interests of other nations when they write American laws." *F. Hoffman-LaRoche*, 124 S. Ct. at 2366. By avoiding conflict and interference with foreign laws, this canon of interpretation "helps the potentially conflicting laws of different nations work together in harmony – a harmony particularly needed in today's highly interdependent commercial world." *Id.*

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24. But the efforts to distinguish civil and criminal applications of the mail and wire fraud statute have not been persuasive, and seem unlikely to carry the day. *See id.* at 139 (Calabresi, J., dissenting) ("there is no basis in the revenue rule itself for treating criminal and civil cases differently").

For reasons described above and in petitioners' brief, reading the mail and wire fraud statutes to encompass schemes to evade foreign taxes is certain to create friction with foreign governments and to interfere with the operation and administration of their laws. *See supra* at 24-28; Pet. Br. 12-13. As Judge Learned Hand explained decades ago, when a U.S. court passes upon the construction and validity of foreign tax laws, it involves itself in "the relations between the states themselves, with which courts are incompetent to deal, and which are intrusted (sic) to other authorities" and in doing so "may commit the domestic state to a position which would seriously embarrass its neighbor." *Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929) (Hand J. concurring). This concern is far from hypothetical. In *McNab*, the district court and the Court of Appeals disregarded declarations by Honduran legal authorities about the state of Honduran law. *See McNab*, 331 F.3d at 1235 n.7, 1242. The court's position ultimately led the government of Honduras to file a brief *amicus curiae* in support of the defendants' petition for certiorari in this Court. *See id.* at 1240 n.23. If U.S. courts are routinely required to make difficult judgments about the scope, contours, and validity of foreign tax and revenue laws, embarrassing disagreements and diplomatic incidents of this kind are certain to occur with increasing regularity.

As discussed above, *see supra* at 11-12, 24, there is no indication on the face of the wire fraud statute that Congress intended to abrogate the revenue rule and incorporate the violation of a foreign tax law as a predicate for criminal prosecution. Because the statute is silent on this topic and this dramatic change would unreasonably interfere with the sovereignty of other nations, this Court's settled precedents require a narrower interpretation. *See F. Hoffman-LaRoche*, 124 S. Ct. at 2366.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

BRENDAN DOWD
FRANK GOLDMAN
JEREMY MALTBY
MARK TEETER
JAMES WALDEN
O'MELVENY & MYERS, LLP
7 Times Square
New York, New York 10036
(212) 326-2000

JOSHUA L. DRATEL
(Consel of Record)
NAT'L ASS'N OF CRIMINAL DEFENSE LAWYERS
Co-Chair, Amicus Committee
1150 18th Street, NW
Suite 950
Washington, D.C. 20036
(212) 732-0707

QUENTIN RIEGEL
NAT'L ASS'N OF MANUFACTURERS
Vice President, Litigation & Deputy General Counsel
1331 Pennsylvania Ave., NW
Washington, D.C. 20004
(202) 637-3000

Attorneys for Amici Curiae

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